CC 1.12/2 2:91/7

284-A

VOL 91 (2d Series) April 1-30, 1983 No. 7

# FEDERAL COMMUNICATIONS COMMISSION REPORTS

Dec't
HE
7761
.A381

## (91 F.C.C. 2d)

**Decisions, Reports, Public Notices, and Other Documents of the Federal Communications Commission of the United States**

**VOLUME 91 (2d Series)**

**Pages 1068–1283**

**Reported by the Commission**

FEDERAL COMMUNICATIONS COMMISSION

Mark S. Fowler, *Chairman*

James H. Quello
Joseph R. Fogarty
Anne P. Jones

Mimi Weyforth Dawson
Henry M. Rivera
Stephen A. Sharp

UNIVERSITY OF MICHIGAN
LIBRARIES
MAY 24 1983
DEPOSITED BY THE
UNITED STATES OF AMERICA

UNITED STATES GOVERNMENT PRINTING OFFICE • WASHINGTON, D.C.

For sale by the Superintendent of Documents, U.S. Government Printing Office

Washington, D.C. 20402—on a subscription basis

Notice: The contents of this pamphlet are subject to correction by means of an errata appearing in the bound volumes of the *F.C.C. Reports*. Users are requested to notify the F.C.C. Publications Branch of errors so that an erratum can be inserted in the bound volume.

This is the last pamphlet in Volume 91.

# INDEX


Page

Advanced Mobile Phone Service, Inc.; re Wireline application granted and mutually exclusive applications designated for hearing, CC Docket No. 82–721 (FCC 82–452)..... 512

Amateur Radio Service; re Petitions for rule making denied, Parts 2, 95 and 97, RM-3299 & RM-3317, (FCC 82–459)..... 1068

Amendment of Part 1; re Changes in discovery procedures in adjudicatory hearings, (FCC 82–450)..... 527

Amendment of Part 15; re Provisions for remote control and security devices, Docket No. 20990, (FCC 82–467)..... 539

Amendment of Part 67; re Petition for reconsideration denied, CC Docket No. 80–286, (FCC 82–492)..... 558

Amendment of Section 61.38; re Rules revised to moderate certain cost support requirements and to eliminate others, Section 61.38, (FCC 82–436)..... 1074

AT&T Co., re Applicability of ENFIA to certain OCC services, CC Docket No. 82–619, (FCC 82–438)..... 568

AT&T Co., re Capitalization plan for CPE and enhanced services, Section 64.702(d)(4), (FCC 82–496)..... 578

AT&T Co.; re Motions to modify or eliminate issues in phase two of WATS investigation denied, CC Docket No. 80–765, (FCC 82–437)..... 338

AT&T Co.; re Proposed AT&T rate increase for ENFIA found inconsistent with ENFIA Interim Settlement Agreement, CC Docket No. 78–371, (FCC 82–431)..... 1079

AT&T; re Proposed tariff for Bell Packet Switching Service and related tariff revisions rejected, (FCC 82–355)..... 1

Beacon Operation; re Petitions for rule making granted to extent and otherwise denied, PR Docket No. 81–823, (FCC 82–455)..... 1119

Birmingham Family TV, Inc.; re Applications for construction permit, BC Docket No. 81–293, (FCC 82D–30)..... 356

Birmingham Family TV, Inc.; re Review Board reverses I.D., grants UHF TV construction permit, BC Docket No. 81–293, (FCC 82R–59)..... 348

Bison City TV 49 Limited Partnership; re Applications for television CP; BC Docket No. 81–59, (FCC 82D–19)..... 32

Bison City TV 49 Limited Partnership; re Proceeding remanded to ALJ, BC Docket No. 81–59, (FCC 82R–48)..... 26

Broadcast Corp. of Georgia; re Request for authority to increase operating power denied, Station WVEU, Channel 69, (FCC 82–432)..... 854

CATV Cross-Ownership Rules; re Petition for partial reconsideration of *Report and Order* denied, CC Docket No. 80–767, (FCC 82–491)..... 622

CATV Multiple Ownership; re *Report and Order* adopted; Docket No. 18891, Part 76, (FCC 82–322)..... 46

CBS, Inc.; re Petitions to deny renewal applications for VHF TV stations denied, WCBS-TV, WCAU-TV, et al., (FCC 82–290)..... 167

Cellular Communications Systems; re Delegation of authority to Chief, Common Carrier Bureau, CC Docket No. 79–318, (FCC 82–435)..... 633

*City of New York Municipal B/cing System; re Application for Special Service Authorization denied, Docket No. 11227, (FCC 82–428)..... 635

City of N.Y. Municipal B/cing System; re Applications for special service authorization and construction permits, Docket No. 11227, (FCC 78D–36)..... 659

Cleveland Television Corporation; re Applications for a CP for a new commercial television station, BC Docket No. 80–425, (FCC 82D–25)..... 1129

Cleveland Television Corporation; re Review Board affirmed Initial Decision, BC Docket No. 80–425, (FCC 82R–62)..... 1148

COMSAT; re Request to acquire short-term debt financing approved, Section 201(c)(8), (FCC 82–419)..... 859

Common Carrier Services; re Entry and exit regulations unwarranted, Sections 203 and 214, CC Docket No. 79–252, (FCC 82–350)..... 59

Communications Satellite Corp.; re Application of Comsat to participate in INTELSAT program granted, Section 209(c)(9) and (10), (FCC 82–381)..... 197

Cordless Telephones; re Petition for waiver of Section 15.7 granted subject to conditions, (FCC 82–430)..... 362

Cross-Ownership Rules; re Notice of Proposed Rulemaking adopted; Section 76.501, CT Docket No. 82–434, (FCC 82–323)..... 76

Daytona Broadcasting Co., Inc.; re Appeal pursuant to Section 1.301(a)(4) denied, BC Docket No. 81–262, (FCC 82R–51)..... 95

Democratic National Committee; re Complaint alleging violation of Fairness Doctrine denied, (FCC 82–248)..... 373

Democratic National Committee; re Complaint filed against CBS, Inc. denied, Section 1.4(b) and Section 315, (FCC 82–477)..... 1170

Desert Empire Television Corporation; re Request for reconsideration of prior decision denying waiver granted, KMIR-TV, Channel 36, (FCC 82–471)..... 1178

Donald E. Gilbeau; re Reconsideration of Decision, 91 FCC 2d 98, denied, Section 1.916, PR Docket No. 81–172, (FCC 82R–61)..... 1191

Donald E. Gilbeau; re Review Board affirms ALJ's Initial Decision, Section 97.123, PR Docket No. 81–172 (FCC 82R–47)..... 98

Donald E. Gilbeau; re Revocation of license in amateur radio service, PR Docket No. 81–172 (FCC 82D–23)..... 103

First Charleston Corp. (WCIV(TV)); re Applications of four VHF TV stations to relocate transmitting facilities to common site granted, (FCC 82–239)..... 388

Four States Television, Inc.; re Petition for Special Relief denied, Station KIVA-TV, Channel 12, (FCC 82–439)..... 863

Friendly B/cing Company; re Applications for renewal of licenses for radio stations WJMO and WYLT(FM), Docket No. 19412, (FCC 77D–7)..... 398

Gary W. Kerr; re Application for renewal of amateur radio station and general class operator license; PR Docket No. 81–66, (FCC 82D–24)..... 110

Gary W. Kerr; re Review Board affirms ALJ's Initial Decision, Radio Station WA6JIY, PR Docket No. 81–66, (FCC 82R–46)..... 107

George E. Cameron Jr. Communications; re Review Board affirmed ALJ's grant of CP to new applicant, Docket No. 20629, (FCC 82R–58)..... 870

Gilbert Broadcasting Corporation; re Application for AM station granted and mutually exclusive applications denied, Docket No. 20407, (FCC 82–415)..... 450

GTE-Telenet Communications Corp.; re Interpretation of Section 64.702(a) upheld, (FCC 82–377)..... 232

GTE-Telenet; re Merger conditions eliminated subject to implementation of accounting separation, CC Docket No. 80–197, (FCC 82–352)..... 215

Hanover Radio, Inc.; re Petition for extraordinary relief granted and matter remanded to ALJ, BC Docket No. 80–664, (FCC 82R–55)..... 849

Horne Industries, Inc.; re Applications for construction permit, BC Docket No. 81–551, (FCC 82D–32)..... 1198

Horne Industries, Inc.; re Review Board certified to Commission a comparative b/c case that turns on novel policy question, BC Docket No. 81–551, (FCC 82R–68)..... 1193

INMARSAT ACT; re Earth station ownership and cross-subsidization issues addressed, CC Docket No. 79–35, (FCC 82–375)..... 245

Interconnection Arrangements; re Filing of tariff revisions prescribed by *Interim Order*, 89 FCC 2d 928, rejected, CC Docket No. 82–122, (FCC 82–264)..... 483

Irving Gastfreund; re By Direction letter adopted, Section 73.3520, dated July 15, 1982, Channels 13 and 14, (FCC 82–325)..... 267

Karnack Corporation; re Applications for construction permits granted, Sections 301 and 78.11(a), (FCC 82–344)..... 270

KBBS, Inc.; re Applications for construction permit for FM station, BC Docket No. 81–723, (FCC 82D–34)..... 118

KBBS, Inc.; re Review Board affirms ALJ's Initial Decision, BC Docket No. 81–723, (FCC 82R–49)..... 115

KDAB, Inc.; re Petition on Remand Consistent with Mandate of U.S. Court of Appeals denied, KDAB-FM and KZAN-FM, (FCC 82–380)..... 277

Mobile B/cing Service, Inc.; re Petition for reconsideration of staff's action of February 23, 1982, denied, Section 73.3525, (FCC 82–442)..... 1209

Mobile Telephone, Inc.; re Application for review denied, Station KOE252, (FCC 82–449)..... 907

Northern Television, Inc.; re Petition to deny renewal applications denied, (FCC 82–293)..... 305

Paging Operations; re Report and Order adopted re amendment of Parts 2, 22, and 90 of rules, GEN. Docket No. 80–183, (FCC 82–339)..... 1214

Part 15 Amended; re Memorandum Opinion and Order adopted clarifying certification of electronic games, GEN. Docket No. 80–439, (FCC 82–406)..... 290

Part 15 Amended; re Report and Order adopted reclassifying electronic games, GEN. Docket No. 81–462, (FCC 82–407)..... 296

Phone Depots, Inc.; re Commission affirms staff's findings and Motion for Stay denied, (FCC 82–447)..... 1244

Provident B/cing Company; re License renewal application granted subject to EEO reporting conditions, Station WQCK-FM, Section 73.3587, (FCC 82–473)..... 1247

Ralph C. Wilson Industries, Inc.; re Renewal applications granted and petitions to deny denied, (FCC 82–400)..... 139

Ralph C. Wilson Industries, Inc.; re Request for waiver of territorial exclusivity rule denied, Section 73.658(m), (FCC 82–399)..... 127

Random Selection/Lottery Systems; re Second Notice of Proposed Rule Making adopted, GEN, Docket 81–768, (FCC 82–420)..... 911

Satellite Business Systems; re Application of SBS granted, Section 214, (FCC 82–422)..... 940

Satellite Television Corp.; re Application for CP granted and Petitions to deny denied, (FCC 82–427)..... 953

Simon Geller; re Petition for reconsideration of 90 FCC 2d 250, denied, Station WVCA-FM, Docket No. 21104, (FCC 82–461)..... 1253

Sonic Cable TV; re Notice of Apparent Liability issued, Section 503(b), Section 1.80(f), (FCC 82–440)..... 1002

Southern Oregon B/cing Co.; re Request for tax certificate granted; (FCC 82–470)..... 1258

Teleprompter Corp.; re Petition for special relief seeking waiver of cross-ownership rules granted, (FCC 82–356)..... 146

Tel-Page Corporation; re Application for review denied, File No. 20460–CD–P–(1)–82, (FCC 82–448)..... 1007

Texas Television, Inc.; re Board grants reconsideration petition, Section 311(c)(3), BC Docket No. 80–578, (FCC 82R–76)..... 1047

Texas Television, Inc.; re Review Board denies appeals and affirms ALJ's order, BC Docket No. 80–578, (FCC 82R–57)..... 1043

TV-8, Inc.; re Applications for construction permit, BC Docket No. 80–454, (FCC 82D–13)..... 1019

TV-8, Inc.; re Review Board reversed Initial Decision, granted UHF TV CP, BC Docket No. 80–454, (FCC 82R–52)..... 1012

U.S. Transmission Systems, Inc.; re Petitions to remove conditions from facilities granted, (FCC 82–402)..... 329

Virginia Beach Ambulance Service, Inc.; re Application for review of staff's action denied, Section 90.35(a)(3), Station WZM–628, (FCC 82–398)..... 335

Waters B/cing Corporation; re Review Board Decision, 88 FCC 2d 1204, set aside Section 1.115(g), BC Docket No. 80–688, (FCC 82–483)..... 1260

Western Union Telegraph Co.; re Authorization granted to common carrier; Section 214, (FCC 82–378)..... 1051

## Subject Digest

Advertising, False, Misleading, Deceptive

Review Board affirmed Initial Decision; granted television construction permit to applicant with substantial integration preference over competitor with slight diversification preference. Preferred stockholder interests given slight diversification weight but cause no cross ownership or cross interest problem. Central city and contiguous suburb found to be one community for Sec. 307(b) purpose.
—*Cleveland Television Corp.*
BC Docket No. 80–425

Amateur Radio Service

Petitions for rule making granted to extent specified and otherwise denied. Commission specifically defines "beacon operation" in the rules and authorizes automatic control of stations in beacon operation.
—*Beacon Operation*
PR Docket No. 81–823

Petitions for rule making requesting expansion and modification of CB Radio Service and establishment of new personal radio services denied. No compelling need exists to expand the service or to set aside sideband-only channels within the service.
—*Amateur Radio Service*

Amateur Radio Service, Technical Standards
(See: Amateur Radio Service—*Beacon Operation*)
Amateur Station, Beacon Operation

(See: Amateur Radio Service—*Beacon Operation*)
Application, Dismissal of

Petition for reconsideration of staff's action of February 23, 1982, denied. Under Section 73.3525, republication required where application to be dismissed would have provided first local outlet to a community of 2,382, and remaining application would provide a second local outlet (first fulltime) to a community of 41,600.
—*Mobile B/cing Service, Inc.*
CATV Cross Ownership Divestitures, Tax Certificates

Request for tax certificate granted. Tax certificate issued to broadcaster for sale of interest in colocated cable television systems.
—*Southern Oregon B/cing Co.*
CATV Program Exclusivity, Network Programming

Request for reconsideration of prior decision denying waiver of significantly viewed exemption to network program nonduplication rules, for twenty-four month period granted. B/cers submissions indicate that loss of nonduplication protection appears to have had negative effect on the station's audience along with financial difficulties warrant temporary relief.
—*Desert Empire Television Corporation*
Certification of Questions

Review Board certified to Commission a comparative broadcast case that turns on novel policy question of which of two 100% integrated applicants is to be preferred: one with 15% minority participation enhancement credit or other with 100% female participation enhancement credit.
—*Horne Industries, Inc.*
BC Docket No. 81–551
Citizens Radio Service

(See: Amateur Radio Service—*Amateur Radio Service*)
Citizens Radio Service, Frequencies

(See: Amateur Radio Service—*Amateur Radio Service*)
Common Carrier, Rates, Just and Reasonable Charges

Proposed AT&T rate increase for ENFIA found inconsistent with ENFIA Interim Settlement Agreement. AT&T permitted to file reduced rate increase found more in accord with agreement.
—*AT&T Co.*
CC Docket No. 78–371
Common Carrier, Settlement Agreement

(See: Common Carrier, Rates, Just and Reasonable Charges—*AT&T Co.*)
Comparative Criteria

Review Board Decision, 88 FCC 2d 1204, set aside. Credit for minority ownership in a comparative proceeding found to be of at least equal significance as credit for local ownership. Applicant also awarded moderate enhancement credit for residence and past participation in civic activities within the service area of the proposed station but outside of the community of license.
—*Waters B/cing Corp.*
BC Docket No. 80–688
Comparative Hearing

(See: Advertising, False, Misleading, Deceptive—*Cleveland Television Corporation*)
Cross-Interest

(See: Advertising, False, Misleading, Deceptive—*Cleveland Television Corporation*)
Domestic Public Land Mobile Radio Service

Commission affirms staff's findings that applicant for additional transmitter locations for existing DPLMRS facility demonstrated adequate public need and site availability. Motion for Stay denied.
—*Phone Depots, Inc.*

Report and Order adopted re amendment of Parts 2, 22, and 90 of rules to allocate spectrum in 928–941 MHz band and to establish other rules, policies and procedures for one-way paging stations in the Public and Private Land Mobile Radio Services.
—*Paging Operations*
GEN. Docket No. 80–183
Domestic Public Land Mobile Radio Service, Need For

(See: Domestic Public Land Mobile Radio Service—*Phone Depots, Inc.*)
Employment, Equal Opportunity Rule, Compliance Ordered

License renewal application granted subject to EEO reporting conditions. Petition to deny dismissed as untimely and treated as informal objection. No substantial and material question of fact was raised regarding licensee's past programming.
—*Provident B/cing Company*
Fairness Doctrine, Political Party Doctrine

Complaint filed against CBS, Inc. denied. *Zapple* doctrine does not apply to same categories of bona fide news programming exempt from equal opportunities under Section 315. In determining whether news programming is exempt, broadcaster expected to make reasonable, good faith decisions based upon newsworthiness, not for the purpose of advancing a candidate or the candidates of a particular political party.
—*Democratic National Committee*
Female Ownership-Participation, Comparative Credit for

(See: Certification of Questions—*Horne Industries, Inc.*)
Local Ownership

(See: Comparative Criteria—*Waters B/cing Corporation*)
Minority Ownership, Effect on Application

(See: Comparative Criteria—*Waters B/cing Corporation*)
Minority Ownership, Factor in Comparative Hearing

(See: Certification of Questions—*Horne Industries, Inc.*)
One-Way Communications

(See: Domestic Public Land Mobile Radio Service—*Paging Operations*)
Ownership Multiple

(See: Advertising, False, Misleading, Deceptive—*Cleveland Television Corporation*)

Paging Service

(See: Domestic Public Land Mobile Radio Service—*Paging Operations*)
Petition to Deny

(See: Domestic Public Land Mobile Radio Service—*Phone Depots, Inc.*)

(See also: Employment, Equal Opportunity, Rule Compliance Ordered—*Provident B/cing Company*)

Political Broadcast, Exempt Program
(See: Fairness Doctrine, Political Party Doctrine—*Democratic National Committee*)

Private Land Mobile Radio Service
(See: Domestic Public Land Mobile Radio Service—*Paging Operations*)

Programming Past
(See: Employment, Equal Opportunity Rule, Compliance ordered—*Provident B/cing Company*)

Reconsideration, Petition for, Denial
(See: Application, Dismissal of—*Mobile B/cing Service, Inc.*)

Reconsideration, Petition for, Denial of
Reconsideration of Decision, 91 FCC 2d 98, denied where petitioner merely repeated or expanded upon arguments already made in his exceptions and considered in the Board's Decision. No new public interest considerations were raised.
—*Donald E. Gilbeau*
PR Docket No. 81–172

Petition for reconsideration of *Simon Geller*, 90 FCC 2d 250, denied. Petitioner failed to demonstrate material errors or omissions in Commission's Decision of June 15, 1982.
—*Simon Geller*
Docket No. 21104

Reconsideration, Petition For, Grant of
(See: CATV Program Exclusivity, Network Programming—*Desert Empire Television Corporation*)

Review Board, Jurisdiction of
(See: Certification of Questions—*Horne Industries, Inc.*)

Review by Review Board
(See: Advertising, False, Misleading, Deceptive—*Cleveland Television Corporation*)

Rules, Amendment of
(See: Domestic Public Land Mobile Radio Service—*Paging Operations*)

Rules, Waiver of
(See: CATV Program Exclusivity, Network Programming—*Desert Empire Television Corporation*)

Stay
(See: Domestic Public Land Mobile Radio Service—*Phone Depots, Inc.*)

Tariff, Cost Support Material
Section 61.38 of rules revised to moderate certain cost support requirements for tariff transmittals, and to eliminate others, because they are no longer useful in the tariff review process.
—*Amendment of Section 61.38*

Transmission First Local
(See: Advertising, False, Misleading, Deceptive—*Cleveland Television Corporation*)

Amateur Radio Service
Citizens Radio Service
Citizens Radio Service Frequencies

Petitions for rule making requesting expansion and modification of CB Radio Service and establishment of new personal radio services. Denied. No compelling need exists to expand the service or to set aside sideband-only channels within the service.

—Amateur Radio Service

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Amendment of Parts 2 and 95 of the Commission's Rules to allocate to the CB Radio Service additional frequencies exclusively for single sideband transmissions only

Amendment of Part 97 of the Commission's Rules to establish a Hobbyist Class of Amateur Radio on frequencies between 27.41 and 28.00 MHz using single sideband transmissions only

Amendment of Parts 2 and 95 of the Commission's Rules to establish new personal radio services

ORDER

Adopted: October 21, 1982; Released: November 12, 1982

BY THE COMMISSION: COMMISSIONER RIVERA ABSENT

1. The Commission has before it three petitions for rule making requesting expansion and modification of the CB Radio Service and the establishment of new personal radio services.

Amateur Radio Service, 1008

*Background*

2. On December 20, 1978, CB Magazine filed a petition for rule making, RM–3299, requesting the Commission to allocate 40 channels (27.540–28.000 MHz) above CB channel 40 for single sideband (SSB) only operation. The petitioner argues that the present CB Radio Service is not adequate for personal communications because of the limited number of channels (23 channels per channel) in the CB Radio Service.

3. A second petition, RM–3317, was filed on January 15, 1979, by the Texas State CB Radio Association. It proposes to create a "Hobbyist Class" in the Amateur Radio Service to operate on the frequencies between 27.410 and 28.000 MHz, i.e., above CB channel 40. It further argues that the CB Radio Service cannot solve many of its problems, unless procedures for obtaining operating privileges are far more restrictive. The petitioner proposes allocating the frequencies 27.410–27.960 MHz for SSB-only operation; 27.960–28.000 MHz for Morse code-only operation, with the frequency 27.455 MHz being reserved for emergency communications. In summary, this petition is for an allocation of frequencies for [illegible] Radio Service.

4. Several thousand supporting [illegible] RM–3299 and RM–3317. Most of these are form letter nature and added little to the arguments advanced by the petitioners. Several CB radio manufacturers have also written stating negatively [illegible] an adverse economic impact on their inventories of CB radios.

5. The Commission is also in receipt of a petition filed on September 21, 1981 by the Personal Radio Operators Federation (PROIF), of Vista, California. PROIF proposes a broad revision and expansion of the Commission's present structure to provide a host of land CB-type radio services in the frequency bands at 27 MHz, 220 MHz and 900 MHz. PROIF also proposes to expand the CB Radio Service frequency allocation from 27.410 MHz to 27.540 MHz for single sideband-only operation.

*Discussion*

6. The proposal contained in RM–3317 to create a "Hobbyist Class" of Amateur Radio [illegible] considered by the Commission. Article 41 of the International Telecommunication Union's 1959 *Radio Regulations* prohibits any administration [illegible] to operators. The United States [illegible]

Amateur Radio Service
Citizens Radio Service
Citizens Radio Service, Frequencies

Petitions for rule making requesting expansion and modification of CB Radio Service and establishment of new personal radio services denied. No compelling need exists to expand the service or to set aside sideband-only channels within the service.
—*Amateur Radio Service*

FCC 82–459

**BEFORE THE**

# FEDERAL COMMUNICATIONS COMMISSION

**WASHINGTON, D.C. 20554**

| | |
|---|---|
| In the Matter of | |
| Amendment of Parts 2 and 95 of the Commission's Rules to allocate to the CB Radio Service additional frequencies exclusively for single sideband transmission. | RM–3299 |
| Amendment of Part 97 of the Commission's Rules to establish a Hobbyist Class of Amateur Radio on frequencies between 27.41 and 28.00 MHz using single sideband transmissions only. | RM–3317 |
| Amendment of Parts 2 and 95 of the Commission's Rules to establish new personal radio services. | |

ORDER

Adopted: October 21, 1982; Released: November 12, 1982

BY THE COMMISSION: COMMISSIONER RIVERA ABSENT.

*Introduction*

1. The Commission has before it three petitions for rule making requesting expansion and modification of the CB Radio Service and the establishment of new personal radio services.

*Background*

2. On December 20, 1978, CB Magazine filed a petition for rule making, RM–3299, requesting the Commission to set aside certain frequencies (27.540–28.000 MHz) above CB channel 40 for single-sideband (SSB) only operation. The petition argues that the requested allocation will not result in additional television interference, and that the expansion is warranted on the basis of the channel loading existing then (250,000 users per channel) in the CB Radio Service.

3. A second petition, RM–3317, was filed on January 19, 1979, by the Washington State CB Radio Association. It proposes to create a "Hobbyist Class" in the Amateur Radio Service to operate on the frequencies between 27.410 and 28.000 MHz, i.e., above CB channel 40. It further argues that mere expansion of the CB Radio Service would not solve many of its problems, unless procedures for obtaining operating privileges are far more restrictive. The petitioner proposes allocating the frequencies 27.410–27.950 MHz for SSB-only operation; 27.950–28.000 MHz for Morse code-only operation; with the frequency 27.455 MHz being reserved for emergency communications. In summary, this petition is for an allocation of frequencies for the creation of a new class of Amateur Radio Service license.

4. Several thousand supporting comments were filed in response to RM–3299 and RM–3317. Nearly all of the comments were of a "voting" or form letter nature and added little to the arguments advanced by the petitioners. Several CB radio equipment manufacturers commented negatively, fearing an adverse economic impact due to the obsolescence of their inventories of CB sets.

5. The Commission is also in receipt of a petition for rule making filed September 21, 1981 by the Personal Radio Operators International Federation (PROIF), of Vista, California. PROIF proposes a broad revision and expansion of the Commission's present personal radio service structure to provide a total of four CB-type radio services in the frequency bands at 27 MHz, 220 MHz and 900 MHz. PROIF also proposes to expand the CB Radio Service frequency allocation from 27.410 MHz to 27.540 MHz for single sideband-only operation.

*Discussion*

6. The proposal contained in RM–3317 to create a "Hobbyist Class" of Amateur Radio license within the Amateur Radio Service cannot be considered by the Commission. Article 41 of the International Telecommunication Union's 1959 *Radio Regulations* prohibits any administration (signatory nation) from authorizing Amateur stations on frequencies below 144 MHz without a Morse code proficiency test being administered to operators. The United States is a signatory nation. The Washington

State CB Radio Association's proposal to allocate the frequencies between 27.410 and 27.950 MHz for SSB-only operation in a "Hobbyist Class" within the Amateur Radio Service (i.e., a class of amateur license without a Morse code proficiency examination) would violate the ITU's regulations. Thus, the Commission will not consider the Washington State CB Radio Association's proposal. However, the question of expansion and modification of the CB Radio Service to provide for a SSB-only allocation, as addressed in the two other petitions, is within the realm of Commission authority.

7. On July 23, 1974, the Commission adopted a Notice of Proposed Rule Making in Docket 20120 (39 FR 28167, August 5, 1974). In this Notice, we proposed, among other things, to expand the CB Service frequency allocation to 27.505 MHz and to set aside the channels between 27.310 and 27.505 MHz exclusively for SSB operations. Subsequent to the issuance of this Notice, laboratory and field tests were conducted by the Commission and others. These tests demonstrated that, under certain circumstances, intermodulation interference would be generated by CB transmitters which were operated on channels separated by roughly 455 kHz.[1] This interference could result in degradation of all nearby CB communications, regardless of the CB channel to which the "victim" receivers were tuned. As a result of this potential problem, the Commission released a Notice of Inquiry and Further Notice of Proposed Rule Making on March 29, 1976 (41 FR 14527, April 6, 1976) in Docket 20120, which proposed, among other things, to expand the CB Service frequency allocation, but to limit the expansion to an upper bound of 27.410 MHz, thus avoiding the intermodulation interference. On July 29, 1976, the Commission released a Second Report and Order in Docket 20120 (60 FCC 2d 762 (1976)) adopting this proposal. This expansion brought the total number of CB channels to 40. Because of the explosive growth in the number of licensees and the fact that the vast majority of them used amplitude modulation (AM) equipment, none of the channels was set aside exclusively for single sideband (SSB) operations, although SSB was allowed on all 40 channels on a shared basis with AM.

8. In May and June of 1978, the Commission dismissed three petitions for rule making from single sideband operators (RM–2328, RM–3070 and RM–3072), requesting that some or all CB Radio Service channels be reserved for SSB-only operation. Dismissal was on the basis that this issue had already been considered in Docket 20120, cited above.

9. Interest in sideband-only channels in the CB Radio Service has persisted, as evidenced by the three petitions now at hand. Nevertheless,

[1] Intermodulation interference occurs when two or more signals combine in a RF device to produce additional, unwanted, signals. See FCC/OCE Laboratory Report 76–02, available from the National Technical Information Service, Springfield, VA 22161; telephone (703) 557-4690.

subsequent events have borne out the Commission's 1976 decision in Docket 20120. A 1979 study by the National Telecommunications and Information Administration (NTIA) demonstrated that expansion of the CB Radio Service to more than 40 channels would carry with it some risk of substantial reduction in the present operational range of CB radios.[2] Moreover, the CB Radio Service itself has undergone profound change since the instant petitions were filed.

10. The CB Magazine petition, filed in December, 1978, argued that expansion of the CB Radio Service was warranted on the basis of channel loading, i.e., some 250,000 users per channel. The Commission's records support this argument. In fact, CB radio continued to grow until October, 1979, when there were 14,806,860 licensed stations or 370,000 users per channel. However, the CB Radio Service has been contracting ever since. In June of 1982, there were 6,370,795 licensed stations, or 159,000 users per channel. CB licensees are renewing their licenses at a rate of less than 5% per month. The Commission's records, therefore, equally support the conclusion that expansion of the CB Radio Service is not warranted by loading levels. Nor is the increased risk of interference to television channel 6 due to harmonic or the risk of service degradation due to intermodulation products outweighed by any need to expand the service.

11. PROIF's proposal to reallocate amateur radio frequencies from 220 to 222 MHz for a CB-type operation and its request that the Commission issue a Notice of Proposed Rule Making proposing creation of a new type of personal radio service at 900 MHz are the subjects of both past and present proceedings. On March 10, 1981, the Commission adopted an Order dismissing RM–2926 which proposed permitting CB–type operation between 220 and 222 MHz. On June 7, 1979, the Commission adopted a Notice of Inquiry in PR Docket 79–140 (44 FR 37522, June 27, 1979) concerning the creation of an additional personal radio service at 900 MHz. A petition for rule making, RM–4121, has been filed in conjunction with that proceeding and is currently being evaluated by the staff. Thus, a frequency allocation for a CB-type operation at 220 MHz was recently considered and dismissed, while a similar allocation at 900 MHz remains under consideration.

12. The PROIF petition also proposes that Part 95, Subpart E, Technical Regulations, Personal Radio Services, 47 CFR 95.617(c)(5) be

---

[2] The National Telecommunications and Information Administration conducted a study to determine the probability of second-order intermodulation product interference if the CB Radio Service were expanded to include more than the present 40 channels. The results of the study were presented in the form of decreases in the average operational range of CB stations in the presence of radio noise, co-channel interference, and intermodulation interference. For the worst case, on an unused channel, the communications range of the CB service would be reduced as much as 24% from the present operational range. See L.A. Berry, *Probability of Intermodulation Interference in an Expanded CB Service*, Report #NTIA–TM–79–15, July 1979.

amended to require that CB transmitter harmonic signals be attenuated by at least 80 decibels (dB) for the purpose of further reducing interference to television receivers and other home electronic entertainment equipment. CB transmitters are currently required to have their harmonic signals attenuated by at least 60 dB. A Notice of Inquiry and Proposed Rule Making in Docket 21000, adopted November 16, 1976, 64 FCC 2d 556, proposes to require up to 100 dB of attenuation of the harmonic and spurious emissions from CB transmitters. The matter of harmonic signal attenuation in the CB Radio Service proposed in Docket 21000 remains under consideration.

13. Both RM–3317 and PROIF petition propose that the Technical Regulations for the Personal Radio Services (47 CFR 95.601 *et seq.*) be amended to authorize limited external tuning control for single sideband (SSB) operation to permit, according to the petitioners, more efficient SSB communications. The Commission has recently examined this issue in its review of RM–3531, a petition for rule making filed by the Washington State CB Radio Association. In its Order, adopted November 13, 1981, denying RM–3531, the Commission stated:

> The standard requiring all frequency determining circuitry other than the channel selector to be internal to CB transmitters is intended to keep all stations within designated channels. This prevents off-channel transmissions which could cause interference to the adjacent channels. Because of this potential for interference and because no technical knowledge or training is required of CB operators, type acceptance standards for CB transmitters are essential. The standard requiring placement of all frequency determining circuitry inside the transmitter and therefore inaccessible to operators is critical to the success of the type-acceptance program. Although continual readjustment of the receiver fine tuning device may be somewhat burdensome for single sideband communications . . . we do not believe that this situation merits consideration of a significant change in the type acceptance standards which are the foundation of the CB Service.[3]

14. The PROIF petition goes on to propose that CB Rules 23(a)(9), the 250 kilometer (155.3 mile) distance limitation, and CB Rule 29(b), the five-minute time limitation, be deleted. The CB Radio Service is a shared Service. The domains through which sharing is effected are the time domain and the space (distance) domain. We believe that the limitations contained in the Rules are a reasonable method of assuring that all licensed CB operators have access to the spectrum. The petitioner's argument, that the public does not perceive the time and distance limitations as "realistic", is not compelling.

15. The instant petitions all propose various features that the petitioners request be authorized in the expanded and modified CB Radio and new personal radio services requested. These features would be applica-

[3] A petition for reconsideration of this Order is currently pending and the matter will be considered in that proceeding.

ble only with adoption and implementation of additional frequency allocations. Because we are not providing the additional frequencies, these proposals are not addressed.

*Conclusion*

16. The congested conditions which may have inhibited the coexistence of SSB and AM operations have been significantly alleviated by documented shrinkage in this service. There is no compelling need to expand the service or to set aside sideband-only channels within the service. To the extent that the problem still exists, the public interest plainly lies not in more channels but in more cooperation among users.

17. Accordingly, pursuant to the authority contained in Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), IT IS ORDERED that RM–3299, RM–3317 and the petition for rule making by the Personal Radio Operators International Federation, are hereby DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico *Secretary*

Tariff, Cost Support Material

Section 61.38 of rules revised to moderate certain cost support requirements for tariff transmittals, and to eliminate others, because they are no longer useful in the tariff review process.
--*Amendment of Section 61.38*

FCC 82-436

**BEFORE THE**

# FEDERAL COMMUNICATIONS COMMISSION

**WASHINGTON, D.C. 20554**

In the Matter of

Amendment of Section 61.38 of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: October 6, 1982; Released: October 8, 1982

BY THE COMMISSION:

1. The Commission is currently reviewing its rules governing tariff filings, 47 C.F.R. Part 61, to determine the extent to which rapidly changing circumstances in the telecommunications industry warrant modification or even elimination of existing rules.[1] Although this review is not yet complete, our analysis to date convinces us that certain existing requirements, particularly in the area of tariff support data, should be modified immediately for the substantial benefit of both affected carriers and the Commission's tariff review process.

2. Carriers not otherwise exempt from the requirements of §61.38 are presently required, among other things, to submit with their letters of transmittal a three-year projection of costs, as well as a three-year forecast and a one-year "backcast"[2] of traffic and revenue effects expected

[1] Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. §601 et seq., comments were solicited by Notice in General Docket No. 81-706 (46 Fed. Reg. 56466, November 17, 1981), on proposed revisions to our Rules generally.

[2] The "backcast" attempts to estimate the effect on traffic and revenues of a proposed tariff revision in a recent 12-month period for which operational data already exist.

from changed or new tariff provisions. Such forecasts and backcasts are traditional tools used by regulators to determine whether tariff proposals are reasonably related both to a carrier's past operational experience, and its future expectations. The original imposition of these data requirements in 1970, by the adoption of §61.38, reflected the Commission's concern then that the informational base routinely provided to assist it in evaluating tariff filings was deficient, and occasioned frequent requests for extensive additional information and data to support tariff filings. *Tariffs-Evidence* (Docket 18703), 25 FCC 2d 957 (1970). Moreover, in an era marked by relative economic stability, infrequent rate adjustments, and a comparatively small number of carriers, it appeared reasonable and not unduly burdensome to require carriers to submit extensive forecast and backcast data.[3]

3. Having reviewed these requirements, we now believe such data to be either redundant or of questionable value. For example, though the backcast shows the effect of the proposed changes on the carrier's current customer base, the forecast provides us similar information on a forward looking basis. Such forecasts also include estimated cross elastic effects, which we find more useful for tariff review purposes. Similarly, extended forecasts of costs are of limited use where, as here, we are confronted by a rapidly changing telecommunications marketplace. The Commission's monitoring of its internal processes shows that carriers are filing tariff revisions much more frequently, as they respond to technological developments, changing customer demand, competitive offerings by other carriers, as well as general economic conditions. In such circumstances, reliance on extended forecast and cost data to aid us in our assessment of proposed tariff revisions becomes far more difficult and uncertain. As a consequence, the routine requirement of support materials beyond those reasonably related to these new realities only serves to burden carriers with preparation costs, and potential service delays. In turn, the costs are ultimately passed on to the ratepayer.

4. Accordingly, on our own motion, we have determined to adopt revisions to this Rule which would reduce the period of required cost

---

[3] The Commission explained its rationale for requiring the data by rule as follows:

"Certainly, it is reasonable to assume that in the formulation of new or revised rates, which are to meet the statutory test of justness and reasonableness, carriers would be concerned with the revenue-cost relationships that may be expected to obtain under such rates. Responsible management decision making would dictate the preparation of cost and traffic data of the character called for by the proposed rule . . . [W]e regard the information with respect to revenue-cost relationships as basic to the formulation of the essential regulatory judgments we must make with respect to the lawfulness under the Communications Act of new or revised rates tendered by common carriers." *Id.* at 965.

Whether involving a carrier with a single customer or one with millions, the Commission stated that rate determination "should be based on an evaluation of the size of the existing market, the market size in the foreseeable future, and costs for both periods." *Id.* at 967.

projections and traffic and revenue forecasts from three years to one, and further eliminate the "backcast" requirement that traffic and revenue effects be estimated for the 12-month period preceding the tariff filing. Based on recent experience, we think these reduced requirements will in most cases serve to provide us with data that are meaningful for our review process.[4] In addition, the revised rule has also been restated in part for improved clarity, and contains other, minor changes not intended to alter the rule's requirements.

5. Notice and comment are not required prior to adoption of this rule change because it relates to Commission procedure and practice. 5 U.S.C. §§553(b).[5] Because of this rule is procedural, not substantive, the effective date provisions of the Administrative Procedures Act, 5 U.S.C. §553(d), do not apply here. In any event, since the immediate implementation of these changes relieves carriers of unnecessary regulatory burdens, thereby allowing them to save costs, we find good cause to dispense with the 30-day notice requirement of that Act. 5 U.S.C. §§553(d)(1), 553(d)(3).

6. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 4(j) of the Communications Act, 47 U.S.C. §§154(i) and 154(j), and Section 553 of the Administrative Procedures Act, 5 U.S.C. §553, that Section 61.38 of the Commission's Rules and Regulations, 47 C.F.R. §61.38 is amended as set forth in the Appendix, effective on publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico *Secretary*

*Appendix*

Part 61 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended so that Section 61.38 reads as follows:

§61.38 *Material to be submitted with letters of transmittal.*

(a) *Explanation and data supporting changes and/or new tariff offering.* The material to be submitted for a tariff change or for a tariff offering a new service must include: (1) an explanation of the changed or new matter, the reasons for the filing, and the basis of ratemaking employed; and (2) economic data and information to support the changed or new matter, including:

---

[4] Where this is not the case, of course, we reserve the right to require more extensive forecast and/or backcast materials.

[5] MCI Telecommunications Corp., in comments responding to the General Docket No. 81–706 Notice, expressed reservations that the relaxation of Section 61.38 requirements would inure to the benefit of the American Telephone and Telegraph Company. In response we emphasize that the primary purpose of materials required by §61.38 is to provide the Commission with information to aid in deciding whether the proposed tariff materials present questions of lawfulness which warrant our investigation. International Business Machines Inc. v. FCC, 570 F2d 452, 456 (2d Cir. 1978). Here, we have found the support materials in question to be no longer useful in this inquiry, and it strikes us as unreasonable to continue to burden carriers with such filing responsibilities.

(i) For changed matter, a cost of service study for all elements of costs for the most recent 12-month period; and for changed and new matter, a study containing a projection of costs for at least a one-year period from the date of the filing of the tariff matter; and

(ii) Estimates of the effect of the changed or new matter upon the traffic and revenues from the service to which the changed or new matter applies; upon the traffic and revenues from the carrier's other service classifications; and upon the carrier's overall traffic and revenues. Estimates must include the projected effects on the traffic and revenue data for a one year period from the date of the filing of the changed or new matter. Complete explanations of the bases for the estimates must be provided.

(b) *Working papers and statistical data.* (1) The Chief, Common Carrier Bureau, upon the filing of any tariff change or tariff filing for a service not previously offered, must be provided one set of working papers for use by the staff and a second set of working papers for use by the public at the Commission's offices. Each set of working papers must contain the information underlying the data supplied in response to paragraph (a) of this section, and a clear explanation of how the working papers relate to that information.

(2) All statistical studies must be submitted and supported in the form prescribed in Section 1.363 of this chapter.

(c) *Submission of explanation and data by connecting carriers.* If the changed or new matter is being filed by the issuing carrier at the request of a connecting carrier, the connecting carrier must provide the data and information in paragraphs (a) and (b) of this section on the date the tariff matter is filed with the Commission by the issuing carrier.

(d) *Form and content of material submitted with certain rate increases.* (1) The filing carrier must submit all cost, marketing and other data on which it relies in justification of a proposed rate increase when:

(i) a rate increase in any service or tariffed item results in more than $1 million in additional annual revenues, as calculated on the basis of existing quantities of service, without regard to the percentage increase in such revenues; or

(ii) a rate increase in any service or tariff item results in *(a)* a 10 percent or greater increase in annual revenues from that service or tariffed item, and *(b)* at least $100,000 in additional annual revenues, both calculated on the basis of existing quantities of service; or for two or more rate increases applying to the same service or tariffed item during any consecutive 12 months which, when combined, result in both conditions set forth above in *(a)* and *(b)*.

(2) The data required by sub-paragraph (1) must be in appropriate form to serve as the carrier's direct case in the event the rate increase is set for hearing. If the rate increase is designated for hearing, the carrier must submit any additional information on which it relies in documentary form within 45 days from the date of designation.

(3) The requirement imposed here is in addition to any requirement imposed by the other provisions of this section.

(e) *Copies of explanation and data to customers.* Concurrently with the filing of any rate for special construction (or special assembly equipment and arrangements) developed on the basis of estimated cost, the offering carrier must transmit to the

customer a copy of the explanation and data required by paragraphs (a) and (b) of this section.

(f) *Exception.* This section does not apply to non-dominant carriers, and in any event does not apply to any carrier with annual gross revenues less than $200,000. Annual gross revenues are to be calculated on the basis of gross revenues for the most recent twelve month period, or on the basis of the average of three years' estimated annual gross revenues, whichever is greater.

Common Carrier, Rates, Just and Reasonable Charges
Common Carrier, Settlement Agreement

Proposed AT&T rate increase for ENFIA found inconsistent with ENFIA Interim Settlement Agreement. AT&T permitted to file reduced rate increase found more in accord with agreement.
—*AT&T Co.*
CC Docket No. 78-371

FCC 82-431

**BEFORE THE**

# FEDERAL COMMUNICATIONS COMMISSION

**WASHINGTON, D.C. 20554**

| | |
|---|---|
| In the Matter of | |
| American Telephone and Telegraph Company and the Bell System Operating Companies Tariff F.C.C. No. 8 (BSOC 8) | Transmittal No. 53 |
| Exchange Network Facilities for Interstate Access (ENFIA) | CC Docket No. 78-371 |

MEMORANDUM OPINION AND ORDER

Adopted: September 29, 1982; Released: September 29, 1982

BY THE COMMISSION: COMMISSIONER QUELLO ABSENT; COMMISSIONER FOGARTY DISSENTING AND ISSUING A STATEMENT; COMMISSIONERS JONES AND DAWSON CONCURRING AND ISSUING STATEMENTS.

1. On April 16, 1982, the American Telephone and Telegraph Company (AT&T) and the Bell System Operating Companies (BSOCs) filed increases to their BSOC 8 tariff. That tariff generally governs the provision of certain local exchange access services to other carriers used to provide services "like" AT&T's Message Telecommunications Service (MTS) and Wide Area Telecommunications Service (WATS). The BSOC 8 tariff implements the ENFIA Interim Settlement Agreement approved by the Commission on April 16, 1979, *ENFIA* (ENFIA Order), 71 FCC 2d 440

(1979), and extended by the Commission on April 14, 1982, for a maximum period of an additional two years. *Extension of ENFIA Agreement* (Extension Order), 90 FCC 2d 6 (1982).

2. By Order adopted April 29, 1982, *ENFIA*, FCC 82-208, (Investigation Order), the Commission instituted an investigation of the proposed rate increases and suspended the effectiveness of the rate increases for the allowed statutory period of five months. We also ordered the use of an interim billing and collection rate during the suspension period, subject to adjustment on the basis of any approved or prescribed rate. Subsequently, as required in the Investigation Order, AT&T submitted a report on its calculation of the SEP Amount used in the agreement and BSOC 8 tariff. MCI Telecommunications Corporation (MCI), United States Transmission Systems, Inc. (USTS) and SPC Communications (SPC) filed reports on their billed minutes of use. USTS and SPC also provided supplemental information at the request of the Chief, Common Carrier Bureau.[1] Comments and replies were filed by all of these parties as well as by Satellite Business Systems (SBS) and United States Independent Telephone Association (USITA). As we explain below, we conclude that the proposed rate is unreasonable and not in the public interest, and determine a more reasonable rate within the terms of the ENFIA Agreement.

*Background*

3. The ENFIA Agreement had its genesis in the landmark *Execunet* decisions.[2] In those cases the court concluded that the Commission had not restricted the use of facilities authorized to MCI, and therefore MCI could use its facilities to provide Execunet, an MTS/WATS-type service. It also ruled that the Bell System Companies (and by extension all local telephone companies) are obliged to interconnect their exchange facilities with those of other common carriers (OCCs) to enable the latter to provide any service permitted by their certificates of convenience and necessity (including MTS/WATS "like" services).

4. Up to this time, the OCC's had been paying the local business line rates for local exchange access. However, in May 1978, after the *Execunet* decisions had made it clear that the OCCs would be providing MTS/WATS "like" services, the Bell System companies filed a new tariff with the Commission seeking to offer "Exchange Network Facilities for Interstate Access" (ENFIA) at rates much higher than local business line rates. Numerous pleadings were filed alleging that the proposed ENFIA Tariff was unlawful, anticompetitive, and insufficiently based and supported.

[1] The Bureau Chief also disposed of a number of procedural issues by order adopted August 18, 1982.

[2] MCI Telecommunications Corp. v. FCC, 561 F.2d 365 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978); 580 F.2d 590 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 980.

Because the Commission recognized that the issues raised concerning the ENFIA filing were complex, and encompassed fundamental legal, economic and policy concerns, we accepted a suggestion of the Assistant Secretary of Commerce for Communications and Information to undertake negotiations to arrive at some form of a "rough justice" interim approach to the compensation local telephone companies would receive for use of their exchange facilities by OCCs for MTS/WATS "like" services.

5. Several months of public meetings were conducted under the aegis of the Commission. The telephone companies pointed out that in the past MTS and WATS had been provided to the public through a partnership of local monopoly telephone companies and long-haul carriers, primarily the Long Lines Department of AT&T. Jurisdictional separations procedures were developed to apportion the costs of the facilities used between the interstate and state jurisdictions on the basis of relative usage. Actual division of revenues, however, had been generaly governed by negotiated carrier-to-carrier contracts. The advent of MTS/WATS competition added a new, unanticipated dimension to this process. The local telephone companies felt that if they were requird to interconnect with the OCCs for MTS/WATS "like" services, the OCCs should pay the same compensation that MTS/WATS services pay under existing separations procedures. The OCCs argued that they had not agreed to the separations structure and that they should pay only the local business rate that was charged for services other than MTS/WATS.

6. Ultimately, the participating OCCs and AT&T arrived at an interim agreement.[3] The agreement is limited to "Execunet/SPRINT-type interstate services" and to "any end-to-end MTS/WATS-type interstate services." It does not apply to services which are connected with exchange facilities at only one end (e.g., foreign exchange (FX) and common control switching arrangements (CCSA) with off-network access lines (ONALS)).[4] The agreement is patterned after the method by which local telephone companies are presently compensated for use of exchange facilities for traditional interstate MTS and WATS services.

7. The agreement sets out three Rate Elements, based on segments of local exchange plant. These elements are illustrated in Table 1 of Appendix A. Element 1 consists of the line between an OCC switch and the local exchange (Class 5) switch. Charges for such lines in other tariffs are

---

[3] GTE Service Corporation signed the agreement and undertook to recommend to GTE affiliates the use of a standard contractual arrangement using the agreement's methodology for computing rates. Representatives of trade associations for independent telephone companies agreed to make a similar recommendation to their members.

[4] The parties recognized that these services use local exchange facilities, but on a different basis of compensation. The parties recommended that the Commission undertake expeditious proceedings to resolve questions presented by these services.

incorporated by reference. Element 2 consists of the use of the traffic sensitive portion of the Class 5 switch and the use of other traffic sensitive switching and trunking facilities in connection with calls that are switched through more than one Class 5 switch in the same exchange. The charge is computed to simulate the amounts that local exchange carriers receive through settlements or divisions of revenues when comparable service is provided for MTS or WATS, less a discount for local message unit charges that OCC customers pay to access an OCC switch.

8. Element 3 is the largest and most controversial part of the rate. It covers the use of non-traffic sensitive local exchange facilities such as station equipment, inside wiring, subscriber lines, and the non-traffic sensitive portion of a Class 5 switch. While the cost for these facilities is fixed and is not affected by how much or how little they are used, the existing separations process apportions the cost for these portions of local plant on the basis of minutes of use. Moreover, the existing jurisdictional separations structure relies upon a weighting mechanism to compensate local exchanges for the costs they incur in providing interstate services. Thus, subscriber line use (SLU), is adjusted to yield a higher subscriber plant factor (SPF). The result of the application of SPF to exchange costs is that a minute of interstate MTS or WATS use of local exchange plant is treated as about 3.3 times as costly as a minute of local use. Under the ENFIA Agreement this MTS-WATS cost per minute of exchange use, as determined under the separations process is translated into a separations factor (SEP Amount) to identify the cost per minute of OCC use of exchange facilities.

9. A compromise was worked out with regard to Element 3 which contemplated a partial phasing in of a rate derived from separations-based costs, using what was called Factor P. Initially, Factor P would be 35 percent of the SEP Amount, and could rise to 55 percent if OCC revenues exceeded more than $250 million dollars a year. This factor was specified only for the first three years of the five year agreement. Before the agreement could be extended for another two years, the Commission was required to find it reasonable and in the public interest to continue the agreement, and to prescribe an appropriate Factor P. Reflecting the interim, controversial nature of the agreement, the parties expressly reserved the right to disagree over the proper value of Factor P, and thus of the rate, in the additional two years. The agreement states that AT&T and GTE were expected to urge that Factor P should be increased to 100 percent, and the OCCs were expected to urge that Factor P should be substantially lower than the level in the first three years. The OCC cost per minute derived through the application of Factor P to the SEP Amount is multiplied by the OCCs' billed minutes of use, updated yearly. The OCCs are required to file reports of their billed minutes of use per ENFIA in the months of August, September, and October of each year.

AT&T is then required to file revised rates based on the billed minutes reported in the test period, and the other factors in the rate formulas, to be effective in April of the following year.

10. When the agreement was first considered, the Commission did not know the relevant costs for exchange services provided to OCCs for MTS/WATS like services. However, the agreement reached by the parties concerning Element 3 appeared to be an acceptable compromise between the business rate and a rate based upon unadjusted separation costs. It provided certainty for all the parties, while at the same time reflecting the fact that OCCs did not have access to various capabilities and functions available to traditional MTS and WATS carriers. For example, signal quality was lower, call billing and signalling were unavailable, the OCCs could not use rotary dialing, and OCC calls required more digits to complete.

11. Accordingly, the Commission approved the agreement. We viewed our obligation as one of assessing the public interest, not just the individual interests of the signatories and commenters, and we concluded that the agreement was an acceptable interim compromise of hotly contested rate issues which could not otherwise be resolved without substantial expenditures of time, expense, and effort. Thus, our approval was an interim arrangement to carry out the mandate of the *Execunet* decisions and establish a workable *modus vivendi* among all parties until the many difficult, complex, and fundamental issues presented by the advent of competition had been resolved.

12. The BSOC 8 tariff became effective on April 15, 1979. Since that time substantial progress has been made in resolving some of the issues regarding OCC access, but many are still under consideration. In the Market Inquiry, CC Docket No. 78-72, the Commission concluded that MTS/WATS competition was in the public interest.[5] We undertook to establish a mechanism for exchange access charges and have considered several rounds of comments. The separations process is currently under review by a Federal-State Joint Board in CC Docket No. 80-286.[6] Decisions are expected in these proceedings within a few months.

13. Outside the Commission, change has been rapid and often dramatic. The OCCs have grown substantially and greatly expanded their networks. Many new entrants have emergered, often to provide new services. The lower rates of the OCCs' long distance services have proved attractive to residential as well as business customers. Legislative activity on a number of bills has focused the attention of Congress, the

---

[5] Report and Third Supplemental Notice of Inquiry and Proposed Rulemaking, 81 FCC 2d 177 (1980).

[6] Amendment of Part 67 of the Commission's Rules and Establishment of A Joint Board, 78 FCC 2d 837 (1980).

press, and the public on the policy future of local and long distance telephone services.

14. Of course the most important event for this proceeding has been the consent decree reached between AT&T and the Department of Justice in January of this year and recently approved with modifications by the United States District Court for the District of Columbia.[7] Under this decree, the Bell operating companies will be divested from the remainder of AT&T, including AT&T Long Lines, within 18 months. As part of this consent decree, which will result in the largest corporate divestiture in history, the divested BSOCs eventually will have to provide all interexchange carries with access to BSOC exchange facilities on an unbundled, tariffed basis, equal in type, quality and price to that offered to AT&T and its affiliates. These tariffs will replace the division of revenues process and AT&T will itself be a customer for whatever form of ENFIA-type service is implemented pursuant to the decree.

15. The original ENFIA rate was $20.13 for Element 2, and $69.31 for Element 3, for a total of $83.44[8] This rate had risen to $122.20 by April 1982 under provisions in the agreement. During those three years OCC revenues grew rapidly, although AT&T's near monopoly share of the overall market was virtually unaffected and its overall revenues and profits grew steadily.

16. On March 1, 1982, the Commission issued a public notice inviting comment on the possible extension of the ENFIA Agreement. Based on this record and our consideration of the public interest, we concluded on April 14, 1982 that extension of the agreement was warranted.[9] The same considerations which led to acceptance of the agreement weighed heavily in favor of extending it. Many important issues necessary to the establishment of access charges to replace ENFIA remained unresolved. We still had no reliable basis for replacing the ENFIA mechanism, and realized that such action might occasion needless, temporary dislocation in the marketplace. In general, we recognized that an intermediate level of payment—lower than the charges effectively paid by MTS/WATS customers to cover separations-based revenue requirements, but higher than the rates other customers pay for facilities such as FX and CCSA-ONALS—is at least as appropriate now as it was in 1979. We rejected OCC arguments that we should freeze the rate at a particular dollar figure. Instead we extended the existing 55 percent level of payment (Factor P) but made no disposition on the disputed issue of the proper number of billed minutes to be used in the ENFIA rate elements. We

---

[7] Modification of Final Judgment, U.S. v. Western Electric Co., Inc. and American Telephone and Telegraph Co., Civil Action No. 82–0192 (D.D.C. filed August 24, 1982).

[8] Element 1 varied according to jurisdiction. The agreement stated that it averaged about $4.50 per month. A history of ENFIA rates is summerized in Table 2 of Appendix A.

[9] Exchange Network Facilities for Interstate Access, 90 FCC 2d 6 (1982).

ruled that this dispute would be addressed in the context of revisions to BSOC 8.

17. On April 16, 1982, AT&T filed its Transmittal No. 53, AT&T proposed to increase the SEP Amount from $.0595 to $.0658, and the billed minutes from 3000 to 5823. The combined Elements 2 and 3 rate would thereby rise from $122.20 to $258.41. The revised SEP Amount was based on internal AT&T figures. The revised billed minutes figure was based on adjustments AT&T claimed were necessary to correct reports of billed minutes filed by major OCCs for the August-October 1981 test period. Petitions to reject or suspend and investigate were filed by all the major OCCs and other parties. The OCCs contended primarily that increased usage per ENFIA line since 1979 was largely for residential, off-peak use which was not anticipated when ENFIA was adopted. MCI argued that it was an understanding of the parties that only business use during normal business hours was to be considered in calculating billed minutes. It urged that the agreement be applied or reformed to give effect to this claimed understanding. SPC and USTS contended that some adjustment was necessary to reflect the off-peak character of the increased usage. The petitioners also contended that the SEP Amount was not jusitified and that AT&T's adjustments to the reported billed minutes were improper, or urged, in effect, that the agreement should not have been extended.

18. We concluded that substantial questions were raised concerning the lawfulness of the revisions and their conformity with the language and intent of the ENFIA agreement. We suspended the revision for five months and set two issues for investigation: (1) the proper number of average billed minutes per ENFIA per month during the test period, within the meaning and purpose of the ENFIA agreement; and (2) the correct SEP Amount factor. AT&T was required to file a report explaining and justifying the SEP Amount and the major OCCs were directed to file full reports of their billed minutes, listing and quantifying any adjustments to the total minutes actually billed to their customers. In order to avoid any disruption of service after the expiration of the existing tariff, and to protect the rights of all parties during the pendency of the investigation, the Commission imposed an interim billing and collection rate based on a SEP Amount of $.0658 and 4000 billed minutes. This rate, $178.46 per line per month, was subject to adjustment on the basis of any ultimate agreement or Commission decision in this investigation.

*Discussion*

19. The ENFIA agreement provided that the two year extension of the agreement (Phase II) would be implemented if "the FCC determines that it is reasonable and in the public interest to implement Phase II and determines an approximate level of payment for use of jointly used

subscriber plant to be applied during that period." ENFIA Agreement, at para. 11. The Commission made these formal findings in its April 14th order.[10] We recognized at the time that we would have to resolve a dispute between the parties as to the proper calculation of billed minutes under the contract, but we felt that this could be more adequately resolved within the context of revisions to BSOC 8. 90 FCC 2d at 18.

20. Our role at this juncture is to ensure that AT&T's revisions to BSOC 8 conform to the terms of the ENFIA agreement and do not undermine our finding that the agreement is reasonable and in the public interest. Well-established law "restricts federal agencies from permitting regulatees to unilaterally abrogate their private [carrier-to-carrier] contracts by filing tariffs altering the terms of those contracts." *MCI* v. *FCC*, 665 F.2d 1300, 1302 (D.C. Cir. 1981). This may require the agency to interpret various contract provisions especially in instances such as this, where the provisions are ambiguous and the parties disagree as to how they should be applied to changed circumstances. Our view of contested provisions is particularly critical here because extension of the agreement was intentionally linked by the parties to a Commission finding that it was reasonable and in the public interest.

21. The main points of controversy regarding BSOC 8 are AT&T's proposal to increase the SEP Amount from $.0595 to $.0658, and the billed minutes from 3000 to 5823. The parties now have widely divergent views about the meaning and application of these provisions in the agreement. Where the method of computing billed minutes or the SEP Amount is subject to conflicting interpretation we have attempted to apply the agreement in a manner consistent with the intent of the parties. The parties intended that ENFIA rates would reflect a compromise between rates based upon the full cost assigned to the interstate jurisdiction (upon which AT&T's BSOC 5 tariff was based) and the rates for local service (so-called B-1 rates) which the OCCs had been paying. Put simply, the ENFIA agreement was a "rough justice" compromise intended to maintain a reasonable balance between the parties until Commission-prescribed access arrangements could be put into place. Similarly, our public interest obligation requires us to ensure that the nascent competition which has developed in the MTS/WATS interstate markets is not fatally curtailed during the interim until we can put cost-based access charges into place and until the structural changes contemplated by the consent decree can be implemented.

*Billed Minutes*

22. With regard to billed minutes, some areas of dispute have already been resolved by the parties. For example, AT&T has agreed to a number

[10] 90 FCC 2d at 18.

of adjustments as proper under the agreement, and does not contest others at this time. AT&T and the OCCs agreed: that Texas intrastate minutes should be excluded; that OCC WATS-type services and usage of resold MTS and WATS at one end should be counted as one minute of use per billed minute; that usage of ENFIA-type facilities obtained from independent telcos should be excluded; that intracompany administrative traffic, including testing, should be excluded; that minutes should be adjusted to compensate for rounding up for billing purposes; and that a deduction should be made for OCC billing adjustments and uncollectibles. These adjustments which are displayed on Table 3 of Appendix B appear to be reasonable within the meaning and purpose of the agreement and therefore will be allowed.

23. On other points the parties remain far apart, and it falls to us to select the proper application of the agreement. After reviewing the arguments on both sides of all contested points, we find the following requested interpretations or adjustments are not consonant with the language or purposes of the Agreement: SPC's contention that each billed minute should be counted only once even though the call transits two ENFIA lines; SPC's proposal to exclude its limited-hour long distance service, SPRINT LTD; normalization of the study months; SPC's Seven Day Study Factor; and reductions in line counts to reflect delays in delivery and increased trouble reports. Our detailed consideration of these points is attached to this order as Appendix B.

24. The only adjustment that does appear warranted in the calculation for billed minutes is one to accommodate the fact that the OCCs now generate much larger amounts of off-peak minutes than was contemplated when the agreement was signed. AT&T asserts that this fact is irrelevant because, according to AT&T, the contract on its face provides that all billed minutes should be included. We are persuaded, however, that sufficient ambiguity exists concerning the proper meaning of this term that we should pursue our inquiry to determine the true intent of the parties. It is undisputed, for example, that when the agreement was first signed, the OCCs were primarily concerned with maintaining their ability to compete with AT&T for business customers. Furthermore, the OCC services which formed the basis of the billed minutes count were exclusively business services offered during peak business hours. Thus, it is not surprising that the agreement is silent with respect to the proper treatment of off-peak OCC minutes. However, since the inception of the ENFIA tariff, the OCCs have made extensive expansions into off-peak services. These relatively new offerings have been major contributors to the growth in OCC billed minutes over the past few years. Now that there is a significant dispute as to the number of minutes to be counted, it falls to us to construe the application of the agreement to off-peak minutes in a way that most reasonably gives effect to the intent of the parties.

25. MCI argues that, since under the agreement as it was first implemented only those minutes for business services during business hours were counted, the proper application of the ENFIA agreement requires the exclusion of all non-business and non-business hour traffic.[11] MCI's adjustment under this interpretation results in an exclusion of 43.4% of its traffic from billed minutes.[12] Similarly, SPCC advocates the exclusion of SPRINT LTD. minutes on the basis that the service was not even in existence at the time the ENFIA agreement was signed and is therefore not covered by it, and argues that since it is only available during off-peak hours it is not an MTS/WATS "like" service for the purposes of the agreement. We have found nothing in the ENFIA agreement itself or in the 1978 correspondence from which MCI has drawn its arguments that support the proposition that the signatories to the agreement specifically intended to exclude all non-business and non-business day minutes from the calculation of OCC billed minutes. More importantly, we do not believe that such a construction comports with the overall expectation of parties that reasonable compensation would be paid for any local exchange facilities used. On the other hand, as noted above, we also cannot accept AT&T's views that the measurements required by the agreement, which were initially made on the basis of business hour OCC minutes, cannot contemplate any adjustments for off-peak usage of exchange facilities. While the ENFIA tariff was initially implemented on the basis of 3240 OCC billed minutes per ENFIA per month, shortly thereafter that number was substituted with the negotiated figure of 3000 minutes, which was used throughout the remainder of Phase I despite the fact that actual OCC minutes continued to grwo. Although the actual reasons behind the use of this negotiated minutes figure are unclear, its acceptance by the parties suggests that the filing made by AT&T may have reflected, at least in part, some sort of adjustment for off-peak OCC usage of ENFIA facilities. We cannot here judge the appropriateness of the Phase I adjustment, nor do we have any basis for extending that particular adjustment into Phase II. We merely take it to indicate that the parties themselves have acted in a manner consistent with our view that some sort of off-peak adjustment is necessary and proper within the intent of the agreement. In sum, it is our view that the issue of non-

---

[11] MCI has submitted evidence in the form of correspondence and working papers from the period of the initial negotiations as evidence for the proposition that the parties consciously regarded "total day minutes" as synonymous with "business day minutes." However, while these documents may indicate that studies were performed on the basis of business hour traffic, they do not establish that the parties would have excluded non-business hour traffic, had such traffic represented a substantial portion of OCC operations at the time. Alternatively, MCI argues that the contract should be reformed to that effect under the doctrines of mistake, impracticability or frustration. As addressed more fully in Appendix B, we also find this latter argument to be unpersuasive.

[12] See Table 5 of Appendix B.

business minutes was not addressed at all in the initial negotiations leading to the ENFIA agreement, and that the proper treatment of these minutes must be determined with resort to the conduct of the parties in Phase I and to the fundamental purposes underlying the agreement, and by reference to analogous methods of determining compensation for off-peak minutes which were familiar to and understood by the parties.[13]

26. The ENFIA agreement is merely a mechanism to identify the compensation that local telephone companies should receive for the use by OCCs of exchange facilities in the provision of MTS/WATS-like services. Toward this end, the agreement is patterned after the separations and division of revenues/settlements processes by which local carriers share in interstate revenues according to their costs. *Exchange Network Facilities (ENFIA)*, 71 FCC 2d at 444. AT&T now argues that ENFIA was intended to mirror only the jurisdictional separations phase of the process and that, since under separations procedures no distinction is made between peak and off-peak minutes, no off-peak adjustment should be made to OCC minutes. However, while separations only determines costs, which are subsequently used to divide revenues, the ENFIA tariff also identifies revenues directly. Thus, even though some aspects of the separations process are included in the ENFIA formula in order to provide a rough cost basis for the rates, the formula itself generates a measure of payment rather than cost. In this sense, as SPCC has observed, the tariff was intended to be closely analogous to the division of revenues/settlements process whereby local carriers receive certain shares of the interstate revenue pool, the size of which is affected by AT&T's MTS/WATS rate structure including discounts for off-peak usage. AT&T itself has recognized that the monthly ENFIA charge was "designed to produce aggregate payments by the OCCs for their use of local exchange facilities that would parallel (with certain discounts) the amounts the local companies would have received if the OCCs' patrons had instead used MTS or WATS."[14] We have also previously stated that the Rate Elements 2 and 3 are "computed to simulate the amounts that local exchange carriers receive through settlements or divisions of revenues." *Extension Order* at para. 2.[15] Therefore, in reviewing ENFIA

---

[13] *See* 4 Corbin § 95:

> If the parties have concluded a transaction in which it appears that they intend to make a contract, the court should not frustrate their intention if it is possible to reach a fair and just result, even though this requires a choice among conflicting meanings and the filing of some gaps that the parties have left.

Furthermore, as *Corbin* notes, the content of a clause or contract term "can be determined in accordance with usage or custom with which the parties are familiar." *Id.* at 405.

[14] AT&T Initial Report, filed May 17, 1982, p. 5.

[15] *See also* ENFIA order, 71 FCC 2d 440, 454, in which we noted that the Factor P discount incorporated in the agreement takes into account that "local telephone companies are not compensated precisely on the basis of the Manual's apportionment of costs; their compensation is determined by privately negotiated carrier-to-carrier contracts." We note in passing that, because the

rates, we believe that it is fully consistent with the parties' intentions that the tariff include parallels to AT&T's rate structure, which incorporates off-peak discounts.

27. It is not possible to establish an actual off-peak discount for ENFIA facilities because the tariff is structured to produce a charge per line per month that is not variable by time of day. However, an off-peak discount may be reflected in the per line charge. SPCC and USTS have recommended that such a discount be calculated by adjusting OCC off-peak minutes in a manner consistent with AT&T's discounted rate structure for off-peak usage of MTS and WATS (40% discount for evening and 60% for night and weekend calls). The adjustments proposed by SPCC and USTS were computed by determining the percentage of the carrier's total traffic occurring during the evening and night/weekend periods and weighting the percentage for each study period month by a .60 factor in the case of evening and a .40 factor in the case of night/weekend minutes.[16] This weighted percentage could be applied to total traffic to yield the proper number of billed minutes for the study period. As SPCC has noted, an off-peak rate structure weighting may, theoretically, be more appropriately applied to the SEP amount, which identifies the unit cost per minute of ENFIA usage, rather than to the minutes of usage. However, inasmuch as the cost per minute and the minutes are multiplied together to derive ENFIA rates, the application of a discount to minutes does not significantly affect the outcome. In addition, an off-peak weighting of minutes is well within the terms of the ENFIA Agreement which states broadly that "weighted" average OCC billed minutes of use are to be employed in the formula whereas there is no provision for the use of a weighted SEP amount.

28. It appears that a discount along the lines proposed by SPC and USTS is a reasonable compromise between the complete exclusion of off-peak minutes advocated by MCI and the complete inclusion of such minutes advocated by AT&T. A 40/60% discount calculated for each of the OCC's evening and night/weekend minutes[17] results in an exclusion of

---

contract accords the Commission broad authority to adjust Factor P during the extension period, had we found that either AT&T or the OCCs' interpretation of billed minutes was correct, we could nevertheless have made an appropriate modification to reflect the new developments in off-peak usage by altering Factor P. Because we were able to reach a reasonable accommodation by relying upon principles of contractual interpretation, that course was not followed. Nevertheless, the fact that the same result might have been achieved through another means which was expressly permitted by the contract reinforces our conclusion that, in interpreting this provision, we have not frustrated the actual intentions of the parties.

[16] SPC proposes that such an off-peak discount be made separately and in addition to the exclusion of SPRINT LTD. minutes.

[17] SPCC and USTS submitted breakdowns of evening and night/weekend minutes needed to calculate these discounts in their original reports. Supplementary data have been supplied by SPCC and MCI in response to a request made by letter dated September 13, 1982 by the Chief of the Common Carrier Bureau pursuant to paragraph 37 of the Designation Order which specifically delegated authority to the Bureau Chief to request further information from the parties.

19.40% of MCI's total minutes, 22.35% of SPCC's minutes and 15.68% of USTS' minutes,[18] and produces a weighted average of OCC minutes of use per ENFIA per month of 4474.[19]

29. We believe that this adjustment most reasonably applies the original intent of the parties to the altered characteristics of OCC services. It is also fully consistent with the approach taken by the parties when they entered into the ENFIA agreement, which was to devise a workable compromise between conflicting interests. The off-peak discount we have adopted represents a middle-ground between the proposals made by the parties and will prevent the creation of undue advantages or disadvantages for either AT&T or the OCCs. It has the virtue of paralleling the off-peak discounts in AT&T's own MTS and WATS tariffs, which affect AT&T's settlements payments in a manner analogous to the effect the discount here will have on OCC payments that are in part a temporary surrogate for settlements. Finally, the use of the adjustment yields an ENFIA charge which is acceptable as an interim rate and which enables us to avoid the imposition of a drastic increase that might cause competitive damage to the OCCs in the short remaining period before access charges are in place.

*SEP Amount*

30. The OCCs raise a number of arguments against AT&T's computation of the SEP Amount. Most of these are inconsistent with the intent of the parties as reflected in the agreement and consequently are not accepted. However, we do find that AT&T's calculation must be adjusted to reflect and accommodate our recent decision to freeze SPF at 1981 average levels, a development neither anticipated nor provided for under the agreement.

31. At the time the ENFIA Agreement was signed, jurisdictional allocations of subscribers plant under the separations process, which form the basis of the SEP factor, generally increased each year. We recently determined that the continued growth and multiplicative effect of the SPF factor on the interstate allocation was inconsistent with the originally intended purpose and effect of SPF. We decided that a freeze of SPF at 1981 annual average levels was appropriate in order to preserve the status quo of interstate allocations pending the resolution of the extensive investigation of the proper allocative mechanism for non-traffic sensitive exchange plant costs now being performed by a Federal State Joint Board in CC Docket No. 80-286. *Amendment of Part 67*, 89 FCC 2d 1 (1982). The SPF freeze introduces a significant change in the mechanism through which exchange access costs paid by AT&T are calculated, and, consistent with the express terms of the agreement, we believe that this

[18] The adjusted minutes are summarized on Table 4 of Appendix B.

[19] *See* Table 6 of Appendix B.

development should be reflected in the access costs paid by the OCCs through the ENFIA tariff.

32. However, a freeze on AT&T's proposed 1982 SEP Amount level of $0.0658 would not create parity for the OCCs with respect to AT&T under the structure of the ENFIA tariff. In accordance with the terms of the agreement, the SEP Amount in effect for any particular year is calculated on the basis of Bell System separations results for the previous year. As was recognized in note** to paragraph 10 of the agreement, it was fully anticipated that Bell System SPFs, and therefore the SEP Amount, would increase each year. The one year lag in the increases of SPF reflected in the SEP Amount constituted a discount in the rates charged to OCCs for access to exchange facilities. In order to maintain this discount, which has been in effect since ENFIA was first implemented, the capped SEP Amount should reflect 1980 separations results, the Bell System interstate subscriber plant costs identified in the year prior to the 1981 SPF freeze. The use of this SEP Amount will maintain the proper status quo of interstate subscriber plant costs for the OCCs until new interstate allocative measures are put into effect, and will help prevent disruptive and inequitable rate increases to the OCCs in the remaining interval before the completion of the Commission's work on jurisdictional allocation of NTS costs and access charges. Therefore, the 1981 SEP Amount of $0.0595 will be used throughout Phase II.

*Conclusion*

33. Because AT&T's proposed Transmittal 53 rate increase does not reflect the adjustments to billed minutes and the SEP Amount which we have found to be required to continue the ENFIA Agreement in light of the changed circumstances which have occurred in the three years since the ageement was signed, we conclude that the increase is unreasonable. Moreover, there is good reason to believe that a rate increase of the magnitude proposed by AT&T would defeat the overriding purpose of the agreement to establish an interim, transition rate intermediate between the business line rate and one based directly on separations. The rate increase would impose an effective marginal rate of about 9 cents per minute on all usage, including off-peak, despite the fact that AT&T's rates for more desirable end-to-end MTS service are as low as 6 cents per minute. This rate, and the over 100 percent rate increase proposed by AT&T, would apply to signatories and non-signatories alike even though the newer, non-signatory ENFIA users all likely to have far lower actual usage. Under these circumstances, virtually doubling the billed minutes and the rate might well cause substantial market disruption during this final period of transition and upset the "rough justice" compromise which the agreement attempted to implement, and which seems to have been achieved in the first three years of its term.

34. Our goal in this proceeding has been to resolve the differences between the parties in a manner which conforms so far as possible to the purpose of the agreement, which is to maintain a fair balance between the interests of all parties and to serve the public interest during the final months of transition to a system of exchange access tariffs which will replace both the separations/division-of-revenues process and ENFIA. Because the ENFIA agreement is a compromise between conflicting interests and is not based on costs, mathematical nicety is not possible. But some reasonable rate and some fair resolution of the issues raised by the competing parties are necessary. If we recognize a 40/60% adjustment for OCC off-peak minutes, cap the SEP Amount at 0.0595 and retain the existing 55 percent P Factor, the Element 2 rate under the tariff would be $34.85, the Element 3 rate would be $148.61 and the overall rate would be $183.46 per month. This would be a 50.3 percent increase over the last Phase I rate. We believe this rate, as fairly as any other, should strike a reasonable balance as an interim measure. It recognizes that a rate for non-traffic sensitive facilities in direct proportion to usage is likely to be economically unsupportable and that it would result in marginal rates for OCCs higher than those AT&T charges to MTS/WATS customers in some cases as well as threaten to cause serious disruption during the transition period. Yet it also seeks to implement the purpose of the agreement by allowing rates to reflect usage, in recognition both of the fact that separations process continues to allocate costs based on use and of the need to protect local companies against harm from diversion of toll revenues. The rate also reflects the fact that we previously capped the growth of allocations under the separations process as an equitable transition mechanism.

35. Our action today is admittedly a product of compromises. But of course the agreement itself has always been just such a compromise. For the remaining months of ENFIA, it should provide a measure of stability to all parties without causing undue injury to any. By resolving the other issues raised in this proceeding it should also allow all concerned to devote their attention to resolving the far more important problems of developing permanent exchange access arrangements. It is with these considerations in mind that we conclude that the rates filed by AT&T in AT&T Transmittal No. 53 are inconsistent with the ENFIA Agreement, and we direct AT&T to file a replacement transmittal more in accord with the agreement, using a SEP Amount no higher than $.0595, a billed minutes factor no higher than 4474, and an overall Element 2 and 3 rate no higher than $183.46. We find that this would constitute a just and reasonable rate under the agreement.

36. In the Designation Order, we prescribed an interim billing and collection rate which amounted to $178.46. This rate was subject to adjustment to the rate determined in this investigation. Accordingly, the

OCCs shall remit to AT&T the difference between the two rates for the five month investigation period.

37. Accordingly, IT IS ORDERED, pursuant to Section 4(i), 4(j), and 204(a) of the Communications Act, 47 U.S.C. §§4(i), (j), 204(a), that the tariff material filed under Transmittal No. 53 is found inconsistent with the terms of the ENFIA Agreement, and that AT&T shall file tariff revisions consistent with this order to be effective October 1, 1982.

38. IT IS FURTHER ORDERED, that Sections 61.38, 61.58, 61.59, and 61.116 of the Commission's rules are waived for the purpose of allowing AT&T to comply with this order.

39. IT IS FURTHER ORDERED, that this action is effective immediately.

40. This order is exempt from the provisions of the Regulatory Flexibility Act, 5 U.S.C. §§601 et seq. It involves a rule applicable to particular rates and to practices relating to such rates within the meaning of the exemption contained in 5 U.S.C. §601(2).

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico *Secretary*

Appendix A

Development of ENFIA Rates

*Table 1*

*ENFIA Rate Elements*

*Rate Element 1—Voice Grade Central Office Connecting Facility (VGCOCF)*

This element is taken from BOC and AT&T private line tariffs. In the ENFIA agreement it is stated to be about $4.50 a month. A proposed rate increase is pending which would average about 90% and in some cases would be as much as 440%.

*Rate Element 2—Local Switching and Trunking*

RE 2 = ($3.42 + ($.00691 × Billed Minutes)) × 1.015.
$3.42 is the local switching Termination Amount
$.00691 is the charge per minute less a message unit credit.
1.015 is a factor to adjust for Bell-Independent Extended Area Service areas.

*Rate Element 3-Use of Jointly Used Subscriber Plant*

RE 3 = SEP Amount × Factor P × Billed Minutes × 1.015

*SEP Amount*

The SEP Amount is the Separations Amount per minute for Bell System Interstate MTS and WATS. It is determined by dividing Bell System Interstate Jointly Used Subscrib-

er Plant Annual Costs (determined under the Separations Manual for the twelve months, July through June, terminating in the preceding year) by Bell System Interstate Conversation minutes for MTS and WATS, in the same period.

*Table 2*

*HISTORY OF ENFIA RATES*

| *Tariff* | *Effective Date* | *Rate Element 2* | *Rate Element 3* | *Total* |
|---|---|---|---|---|
| BSOC 5 | Aug. 24, 1978* | $5.35/month<br>$.012/minute | $.05/min. | $182<br>(MCI Estimate) |
| BSOC 8 | Apr. 23, 1979<br>(3240 minutes, $.055 SEP amount) | $20.13 | $63.31 | $83.44 |
| | March 1, 1980<br>(minutes of use reduced from 3240 to 3000) | 20.66 | $60.53 | $81.19 |
| | July 1, 1980<br>(Rate Level B, 45% P Factor) | $20.66 | $77.83 | $98.49 |
| | March 1, 1981<br>(Increase in SEP Amount from $.0568 to .0595) | $22.55 | $81.53 | $104.08 |
| | July 1, 1981<br>(Rate Level C, 55% P Factor) | $22.55 | $99.65 | $122.20 |
| | May 2, 1982<br>(Interim billing & collection rate, 4000 minutes, $.0658 SEP Amount) | $31.53 | $146.93 | $178.46 |
| Suspended rate | | | | |
| | October 1, 1982 | $44.31 | $213.90 | $258.21 |

*BSOC 5 did not become effective and was withdrawn. The rate shown is the full cost rate, for two-way service. Inward use in measured rate exchange areas was $.33/minute.

## Appendix B

### Adjustments to Minutes of Use

#### *I. Agreed adjustments*

These adjustments are summarized in Table 3.

AT&T does not object to acceptance of certain of the adjustments and exclusions proposed by the OCCs. In addition, it believes there are certain adjustments which should not be made but to which it will not object for the limited purpose of this proceeding and, it says, in order to facilitate a prompt determination of minutes of use. The adjustments it accepts are:

1. Limitation of minutes of use to one per minute of interstate conversation a) for WATS-like services using ENFIA at only one end (i.e., MCI's Network Service, SPC's SPRINT IV and USTS' SPNS Plus) and b) where resold MTS or WATS is used to terminate interstate traffic.

The effect of this adjustment is that minutes using ENFIA at only one end would not be doubled. AT&T does this by calculating the raw minutes as twice the MTS-like service minutes plus the WATS-like service minutes and by allowing an adjustment for resold MTS and WATS. The OCCs use different methods. MCI excludes its WATS-like Network Service when it doubles its minutes. It reports a total of about 80,723,000 Network Service minutes for the three months, about 18% of its total raw, undoubled minutes. It also reports and excludes 2,659,350 minutes of resold MTS and WATS. SPC reports 3,635,490 SPRINT IV minutes, about 2% of its raw, undoubled total minutes. SPC reports no resold MTS or WATS minutes. USTS reports 1,901,472 SPNS Plus minutes about 4.2% of its total, raw, undoubled minutes. It reports and excludes 1,232,678 minutes terminating on resold MTS and WATS. AT&T accepts these adjustments.

2. Exclusion of Texas interstate minutes.

MCI reports 63,155,879 doubled Texas interstate minutes. This amounts to a 7.8% reduction of its raw, doubled minutes. SPC uses an indirect methodology to calculate its adjustments. It divides its revenue from relevant usage by the average revenues per minute, which it determined by a traffic study. This gives it a calculated minutes of use. Its adjustments are then made to either revenue or average revenue per minute to arrive at adjusted minutes. For Texas usage, SPC calculates a Texas revenue factor which equals Texas minutes divided by total billed minutes. This factor is calculated as .0228. and used to reduce overall revenues. AT&T treats this as a 2.3% reduction from raw, doubled minutes. SPC objects that the application of its revenue factors to its actual reported minutes, as derived from customer invoices, is inappropriate under its methodology but does not explain why and generally accepts AT&T's adjustments. It does not object to the Texas minutes adjustment calculated by AT&T. USTS reports a total of 2,090,535 Texas intrastate minutes. AT&T calculates this as a 4.7% reduction when doubled and subtracted from total raw, doubled minutes. USTS also contends that Texas lines should be counted, although minutes are not. AT&T contends that the lines should not be counted. This issue is discussed below.

3. Exclusion of minutes of use of ENFIA-like facilities obtained from independent telcos, accompanied by exclusion of such facilities from the ENFIA line count.

MCI does not mention independent telco minutes. SPC calculates a .0354 factor for this traffic which it applies to reduce its revenues. AT&T does not object to this factor but in fact uses a .018 or 1.8% factor in calculating a deduction from raw doubled minutes. This appears to reflect AT&T's belief that the independent minutes are used on only one end of these calls generally and that one minute of ENFIA use should be assigned to these calls. SPC contends that the adjustment should be no less than 3.5%, "the figure AT&T admitted was acceptable and stated it would not alter." (SPC Reply, App. A., p. 7) USTS reports independent usage of 1,095,874 minutes. AT&T accepts a reduction in this amount from USTS' total doubled minutes.

As we explain below, we construe the agreement as requiring that billed minutes of use for each ENFIA be counted, i.e. that billed minutes are doubled when an ENFIA line is used at both ends of the completed call. For that reason, we believe AT&T's 1.8% factor, as applied to SPC's minutes, is correct.

AT&T believes these adjustments should not be made but does not object to them in this proceeding:

1. Exclusion of minutes of use for administrative intracompany traffic, including testing.

MCI deletes this use from its raw minutes. SPC reported intracompany use as a .0021 factor. SPC also reported a testing factor of .0005. AT&T accepts SPC's .0021 intracompany use factor, which it calculates as .2% of the raw minutes or 834,390 doubled minutes. It does not mention the testing factor. If the testing factor is included, as SPC argues it should be, and rounded to .3%, as AT&T rounds other factors, the reduction would be 1,251,585 doubled minutes. USTS reports 6,350,797 doubled minutes or 7.2% of its raw minutes.

Because AT&T's failure to agree to SPC's adjustment for testing appears to be an oversight, we will allow the 0.3% reduction claimed by SPC.

2. Adjustment of minutes to compensate for rounding up, i.e., reduction of billed minutes to customers to reflect the fact that OCC rates are rounded up to whole minutes for billing.

MCI reports no rounding adjustments. SPC calculates a .0517 factor for this adjustment. AT&T accepts this and calculates a 5.2% reduction from raw doubled minutes, or 18,514,140. USTS reports a 4.8% adjustment, or 4,273,172 doubled minutes, which AT&T accepts.

3. Billing adjustments and uncollectibles.

AT&T contends that there are gross differences between the deductions claimed by different OCCs and suggests that the large deductions claimed by MCI and USTS are unwarranted and appear to include improper deductions for defaults by customers in paying correct bills. However, it does not challenge them.

MCI reports 71,034,857 doubled minutes or 8.8% of its raw minutes. USTS reports 13,228,250 minutes or 14.9%. SPC had cited a .0031 factor for "No Answer Supervision, "that is, for revenues which were billed erroneously because ENFIA A does not provide positive answer supervision. SPC states its equipment sometimes commences billing on a call which has not been actually completed. SPC claims in its response that its uncollectibles would be 12.37% based on AT&T's methodology, so that its total factor would be 12.67% to be comparable to the MCI and USTS figures accepted by AT&T.

SPC's figure for uncollectibles is about halfway between the adjustments AT&T accepted for other carriers. Rounded to 12.7%, it would reduce SPC's doubled minutes by about 44,368,477. Since AT&T appears to accept the principle of this reduction, at least for purposes of this proceeding, we will allow this reduction of SPC's minutes.

## II. Disputed adjustments

These adjustments are summarized in Table 5.

1. Doubling of minutes

Paragraph 8(B) of the agreement states that "the OCCs will pay the local telephone company a flat rate which reflects plant costs per minute of use . . . This rate will be adjusted annually on the basis of subsequent OCC weighted average use of the facilities and to reflect a 5% per year increase in plant costs . . . The Bell

System will file changes in the rate level for the following year to reflect the changes in average OCC billed minutes of use per ENFIA per month in accordance with the formula set forth in the ENFIA tariff." Paragraph 13 requires the OCCs to report each year "the current weighted average OCC billed minutes of use per ENFIA per month.

Section 4(B)(2) note 1(a) of the Tariff, at p. 18 states "Billed Minutes will be the weighted average OCC billed minutes of use per ENFIA per month as determined from the information filed by the OCCs in December of each year, reporting OCC billed minutes of use for the preceding August, September, and October."

AT&T argues that because MTS-type services use two ENFIA simultaneously to complete a single call—one ENFIA at each end—the conversation minutes reported by the OCCs must be doubled to determine "minutes per ENFIA." It contends that the agreement recognizes that OCC calls use facilities at both ends of the calls. For example, the OCCs are required to report terminating minutes of use for each central office where independents are involved. It also contends that even if minutes are not doubled, the SEP Amount would have to be doubled because it is derived by dividing Bell System Interstate Jointly Used Subscriber Plant Costs by Bell System interstate conversation minutes. AT&T doubles its conversation minutes in calculating SEP to reflect interstate exchange conversation minutes. It argues that the OCCs cannot have it both ways: they cannot calculate their own billed minutes without doubling, while insisting that Bell minutes be doubled in calculating the SEP Amount. If minutes are doubled in both cases, the result would be a wash for Rate Element 3—the rate would be the same if both OCC and AT&T minutes are doubled as if they are both undoubled, because of the mathematics of the formula. However, the Element 2 rate would be lower with undoubled minutes because the minutes of use are used to calculate that rate element, but the SEP amount is not.

If OCC minutes are not doubled for calculating minutes and AT&T minutes are doubled for calculation of SEP, AT&T claims that local telcos would receive grossly smaller payments. It also points out that MCI agrees that minutes should be doubled and claims that SPC apparently doubled minutes originally when it reported 3210 minutes per month in 1979, but apparently began single counting in 1981 when it reported only 1353 minutes.

SPC and USTS essentially argue that the terms of the agreement specify "billed minutes of use per ENFIA" and that the plain meaning of this phrase indicates that the billed minutes are not to be doubled. Each minute of use by a call traversing the system produces only one billed minute, even if it uses two ENFIA. In filings prior to extension of the ENFIA Agreement, SPC recognized that if the billed minutes were doubled, the SEP Amount should also be doubled.

MCI has always doubled its minutes in its reports. It agrees with AT&T that this was the understanding of the parties when the agreement was signed. However, MCI also states that if AT&T persists in its attempt to repudiate what MCI claims was the contemporaneous understanding that the agreement would not apply to non-business, non-business day minutes, and to base its position on a hyper-literal interpretation of the words used, MCI would ask that the same standard be applied uniformly, and that the minutes therefore should not be doubled.

Although a strictly literal reading of the agreement does provide some support for using undoubled minutes, the agreement as a whole seems clearly to contemplate that minutes will be doubled where a call uses two ENFIA lines. The

original 3240 minutes of use figure was based on this understanding, as MCI agrees, and SPC does not deny AT&T's claim that it initially doubled its minutes. Doubling the minutes also is consistent with separations practice and with the reality that these payments are for local exchanges and there will be two exchanges used for each OCC minute. For these reasons, we conclude that billed minutes of two-end ENFIA use should be doubled to calculate "minutes per ENFIA".

2. SPRINT LTD

SPRINT LTD (now called Home SPRINT) is an SPC service offering long distance calls solely in non-business day, off-peak hours. SPC reports that during the test period 10.5 million minutes, about 6% of its total minutes, were SPRINT LTD. Overall, AT&T calculates that exclusion of SPRINT LTD minutes would reduce SPC minutes by 5.9% which would mean about a 2% overall reduction in weighted minutes for all OCCs.

SPC contends that LTD minutes should be excluded for two reasons. First, it says that the parties never intended to count minutes of services which did not exist in 1978. There was no meeting of minds to include LTD minutes, it argues, and thus they should not be counted. Second, it argues that LTD is not an MTS/WATS-like service under the agreement because it is unavailable during the peak calling periods. SPC says that it is therefore not functionally equivalent, the test for likeness under Section 202(a) of the Act. AT&T notes that the agreement applies to "Execunet/SPRINT-type interstate services or any end-to-end MTS/WATS-type interstate services." The tariff defines "Execunet/SPRINT-type services" to include Execunet, SPRINT, "or any other like service which may be offered by those carriers or any other OCC and which requires the use of the facilities provided herein." (Section 2.6, p. 13) AT&T contends that it is absurd to argue that total billed minutes means only services offered in 1978 under this language. It also argues that the intent to simulate separations would be frustrated if the OCCs were allowed to use local facilities wholly free from charge.

In response, SPC argues that LTD and SPRINT V are not perceived to be the same by customers, thus are not functionally equivalent, thus are not like services, and thus LTD should be excluded from minute counts. It cites in support *Ad Hoc Telecommunications Users Committee v. FCC*, D.C. Cir., decided June 11, 1982. It also argues that since LTD is not subject to the agreement, the lines used for the service should be priced at local exchange rates, as FX and CCSA access lines are, denying AT&T's claim that the lines would be wholly free of charge. It urges as a policy matter that the agreement should be narrowly construed because many other uses of local exchange service, such as resellers, do not pay ENFIA for exchange access.

SPC's argument seeks to apply the technical definitions of a like service, as explained by the court in *Ad Hoc* earlier this year, to the agreement approved three years ago. However, the language of the agreement is broadly written to include all MTS/WATS-type services using ENFIA. Without reaching the questions of whether the service is "like" MTS/WATS under the Act, we believe the agreement applies to SPRINT LTD. The parties clearly intended that the agreement apply to new MTS/WATS type services, not simply to those in existence at the time. Finally, we believe the agreement should be given a natural, practical reading, so far as possible, rather than being either narrowly or broadly construed. The exclusion of these minutes is denied.

3. Normalization

All of the OCCs propose to normalize the reported minutes to adjust for the fact

that the test months are longer than the average month. They argue that the test months are intended to be representative of the average month and that normalizing will adjust for this and prevent an inflated count of the average minutes per month. MCI proposes to normalize on the basis of business days per month, a 2% factor. SPC normalizes on the basis of total days a month. It proposes to adjust its revenues by a factor of .0082. AT&T computes this as a 1.6% adjustment.

AT&T opposes normalization. It notes that the agreement specifies August to October as the test period and does not mention normalizing. It argues that it would be equally logical to adjust the minutes to reflect increased usage during the non-study month of December.

MCI contends that the original calculations of ENFIA rates were based on normalized minutes and this was the understanding and consistent practice of the parties. SPC states that it has always normalized and argues that refusal to normalize would penalize the OCCs by effectively requiring that they compensate AT&T for 368 days a year.

The agreement makes no provision for normalizing, it simply lists the test months. There may be various adjustments which would make the test months more representative, but since no adjustments to test month billed minutes are mentioned, we believe the actual reported minutes should be used, without normalization.

4. Seven Day Study Factor

SPC proposes, in effect, to normalize for days of the week as well as days in the month. It argues that AT&T unit costs are developed on the basis of SLU as measured for MTS and WATS. Measurements of SLU are conducted on a sampling basis during business days. To determine weekend SLU, a count of weekend messages is multiplied by the average weekday message length. This value of SLU is used to develop SPF costs.

SPC claims that the resulting figure is understated because weekend calls are longer on the average as a result of the lower rates. To adjust for this claimed disparity, SPC proposes to adjust its revenues to make its minutes comparable to those used for BSOC 8 unit costs.

The Factor is

$$\text{Factor} = \frac{\text{WDL} \times \text{WDM} + \text{WEL} \times \text{WEM}}{\text{WDL} \times \text{WDM} + \text{WDL} \times \text{WEM}}$$

WDL = Weekday Average Message length
WDM = Number of Weekday Messages
WEL = Weekend Average Message Length
WEM = Number of Weekend Messages

AT&T agrees that SLU is based on business day studies, but denies that any adjustment is warranted. In computing the SEP amount. Bell Annual Costs are divided by conversation minutes. The costs are computed using SLU. If the SLU had been based on 7 day studies, AT&T claims, the likely effect would have been on increase in SLU and hence in costs and SEP. Thus, the proposed adjustment would, it is claimed, confer an improper additional advantage by artificially reducing the minute count.

SPC does not appear to disagree with AT&T's description of the process, but

states that the adjustment makes its minutes comparable to those used by AT&T. In effect, it argues that because AT&T understates its conversation minutes, the OCCs should be able to do so also. SLU should be higher, it argues, but since it isn't, OCC minutes should be reduced in equivalent proportion.

SPC claims the factor under its methodology would be 1.0638. It says that AT&T's 6.0% figure is based on a misinterpretation of the methodology used to calculate the SEP amount, but does not disagree with the figure.

It appears that SPC's proposal would give the OCCs a double break in the way AT&T's SLU is calculated. It also requires complicated adjustments not mentioned in the agreement. Thus, we find the adjustment is not warranted.

5. Minimum billing adjustment.

SPC imposes a monthly charge upon customers who don't use the service for a minimum number of minutes. It proposes to adjust its services and thus its calculated minutes (which it derives from revenues per minute and revenues) to reflect the fact that its revenues are increased by the minimum charge but that it doesn't use ENFIA. AT&T makes no mention of this adjustment and SPC cites this as an example of how AT&T has misunderstood and misapplied SPC's methodology.

If SPC's approach of deriving minutes from overall revenues and a study of average revenues per minutes is accepted, then this adjustment is reasonable. Revenue from the minimum monthly charge overstates the actual billed minutes using ENFIA to some degree. However, this entire methodology seems needlessly complex and indirect. SPC reports its actual billed minutes as derived from customers invoices and there seems no reason why any adjustments should not be based on those actual minutes. The adjustment which we have allowed were calculated in this manner. If the actual billed minutes are used, there would be no reason to adjust them for the minimum charge unless SPC somehow imputes a minimum number of minutes to customers when it imposes the charge. This seems unlikely. Presumably, SPC reports actual minutes and then bills the minimum where the charge applies. In the absence of an adequate showing by SPC that this adjustment is necessary to reflect an accurate count of actual billed minutes using ENFIA, the adjustment is disallowed.

6. Billing Lag Adjustments

USTS complains that the inferior interconnection AT&T provides coupled with a large number of bad credit risk customers has burdened the OCC with an extraordinarily long "cash cycle." Claiming that an average of seventy-six days elapses between its billing and its receiving payment for services, USTS asserts that without automatic number identification and answer supervision it must rely upon customers delaying payment or protesting bill errors to determine actual usage and then revise its invoices to reflect this usage. It blames the resulting lag in payments mostly upon the interconnection arrangements it receives under the ENFIA Agreement. For this reason it applies a billing lag adjustment of 3% to its reported total billed minutes of use to compensate for the cost to itself of delay in receiving funds from subscribers associated with late payments.

AT&T asserts that neither the language of the ENFIA Agreement nor equity supports such an adjustment. It correctly notes that the ENFIA Agreement does not explicitly recognize a "billing lag" adjustment. The agreement does, however, provide for use of a discount factor in computing the charges for rate element 3 in part to compensate for the disparity in the access to local facilities given to the

OCCs for their switched services and to AT&T Long Lines for MTS/WATS. In the *Extension Order*, after concluding that under the terms of the agreement, these quantitative differences in interconnection could be reflected only through adjustments to rate element 3, the Commission decided that continued use of the 55% discount factor already adopted by the parties would adequately compensate for these disparities. Thus, insofar as USTS' problem with delayed payments can be attributed to "inferior interconnection," it appears that the solution intended by the parties when they drafted the agreement was an adjustment to the discount factor rather than to the billed minute factor. USTS' adjustment is therefore disallowed.

7. Peak/Off Peak Adjustments—Exclusion of Non-business and Non-business Hours MOU

The most important adjustments issue concerns off-peak minutes. MCI asserts that only MOU generated by business customers during business hours should be counted to determine billed minutes. It concedes that the ENFIA Agreement on its face contains no such provision, but says that such was the parties' intention when the contract was made. AT&T vigorously denies that the parties ever intended this result and none of the other OCCs agrees with MCI that this was the parties' intent. In fact USTS states that "the ENFIA Agreement was intended to measure revenue producing usage by OCCs of AT&T facilities," and both USTS and SPC recognize that each must bear at least some of the costs associated with local exchange usage whenever it uses local facilities.

To support its position, MCI relies upon a letter written by one of its officers to the FCC in December, 1978, during the ENFIA negotiations as well as some cost support studies produced by AT&T during this same period. Assuming that these documents should even be examined to determine the meaning and purpose of the ENFIA Agreement, they seem to offer little support for the adjustments MCI seeks. When read in context, the letter's use of the term "business lines" and "business day" do not indicate any intent to limit the MOU counted to calculate the billed minute factor. "Business lines" quite clearly refer to the lines connecting MCI switches to local exchange central offices, which were considered business rather than residential lines. Similarly, the AT&T data, when read in context, refers to a comparison between Bell System exchange use in the busy hour with average OCC use in the busy hour. In fact the study refers to SPC as a representative OCC; at that time SPC was offering its switched service only during the business day. We are unpersuaded by this circumstantial evidence that the parties intended to say "business day" minutes in the agreement, where they in fact said minutes.

In the alternative MCI argues that we should reform the contract under the doctrines of mistake, impracticality or frustration.[1] It points to language in the December 7 letter indicating that during the period from July, 1977 until June 1978, its use of its business lines, based on a normalized business month, never exceeded 3240 MOU per line by more than 10%. It asserts that this language shows the parties' intent to tie the rate for ENFIA lines to an index which they believed would limit price fluctuation to a range of about 10%. Since counting all residential MOU as well as business off-peak MOU leads to a billed minute factor of 6214, MCI states the rule followed by the court in *Aluminum Company of America v. Essex Group,*

[1] While MCI never explicitly states how it would reform the agreement, it appears that the reformed contract would exclude at least all residential customer usage from MOUs counted to compute the billed Minute Factor. See MCI Reply at p. 11.

*Inc.*, 499 F.Supp. 53 (W.D. Pa. 1980) requires that we reform the contract under one of the three doctrines listed above.

In *Alcoa* the parties had tied to the Wholesale Price Index the price Alcoa would charge to smelt aluminum for Essex under a twenty-year contract. Alcoa's subsequently incurred costs under the contract rose so much faster than the WPI rose that Alcoa would have lost 60 million dollars over the remaining life of the contract unless the court granted it relief. Finding that the parties believed that they had protected themselves from foreseeable economic fluctuations by tying the price paid Alcoa to the WPI, the court held that the doctrine of mutual mistake applied to discharge Alcoa's duty to perform under the contract. *Id.* at 78. Rather than rescission, however, the court found it more equitable to reform the contract by setting the price so that neither party would experience a windfall and Alcoa's "disappointment" would be reduced to the limit of risk the parties expected when they made the contract. *Id.* at 80.

The December 7 letter was written to justify use of the figure "3240" to compute ENFIA rates for the first year of the ENFIA Agreement. The "10%" comment to which MCI points appears more reasonably to have been offered to justify that figure than to indicate any intent on MCI's part to limit future rate increases. Assuming that the comment did reflect such an intent, however, and that intent was shared by AT&T, the facts in this case would still not warrant applying the doctrines upon which MCI relies. This is not a case in which the new rates that would result from applying an MOU figure that reflects all residential and off-peak calls will lead to MCI's profits being replaced by losses. *See Transatlantic Financing Corporation v. United States*, 363 F.2d 312 (D.C. Cir. 1966). This is, moreover, a case in which a rise in the "index" lay completely within the control of MCI and the other OCCs rather than AT&T. It is difficult to argue that AT&T should be penalized because the OCCs underestimated how successful their business would be. *See generally, Hoffa v. Fitzsimmons*, 499 F. Supp. 357, 362 (D.C.C. Cir. 1980)

For these reasons, we cannot accept MCI's arguments that all non-business, non-business day minutes be excluded.

The contentions of SPC and USTS that off-peak minutes should be discounted are discussed in the body of the order.

8. Adjustments to the ENFIA Line Count

A. Intrastate Usage Adjustment

In Texas the OCCs provide intrastate as well as interstate services. All parties agree that intrastate MOUs should be excluded when computing the billed minute factor. AT&T would also exclude local access facilities used for intrastate services from the ENFIA line count. Noting that it obtains the Texas facilities under the ENFIA agreement at ENFIA rates, USTS asserts that the ENFIA line count should include these lines because "the facilities are clearly interstate while the usage is not."[2]

The agreement requires that the OCCs report the number of ENFIA lines

[2] Whether SPC has included ENFIA lines used for both interstate and intrastate services is unclear. MCI has excluded Texas business lines used for intrastate calls in its ENFIA line count. It notes, parenthetically, that these lines are used only for intrastate service and are billed at local exchange rates.

leased each month during the annual study period of August, September and October. It contains no provision for excluding from the ENFIA lines count those lines used in part for intrastate services. Since the lines in question were obtained under the ENFIA tariff at ENFIA rates, they should be counted under the agreement. AT&T's proposal to exclude them is disallowed.

B. Delivery Delay Factor

USTS claims that there is a substantial increase in line delivery delays during the study period. It reasons that this artificially inflates the average number of billed MOUs per line during the test period. USTS would compensate for this by counting ENFIA lines as if all orders for lines processed by USTS and as yet unfilled by AT&T had in fact beet met. This "correction" reduces USTS' billed MOUs by 14.8%.

SPC makes an adjustment of 6.4% to compensate for late deliveries of ordered ENFIA lines. It complains that AT&T delays delivery and installation of lines far beyond the normal anticipated delivery date not only during the study period but also throughout the year. It reasons that the increased usage per line prices the billed minute factor higher and concludes that this provides a significant incentive to delay ENFIA line deliveries during the test period. MCI makes no complaint about delayed deliveries of ENFIA Lines.

AT&T asserts that some delivery delays are inevitable. It ignores the data submitted by USTS to show that delivery delays rise substantially during the study period. Instead it suggests that the OCCs could place excessive line orders in the study months to depress the billed minute factor.

The OCCs fail to show that AT&T has acted improperly. The data USTS provides shows that in 1981 the number of late deliveries (as defined by USTS) were substantially higher in the test period than in the two months before or the one month after it. The data is insufficient however, to conclude that all, or even most, of the delivery delays were within AT&T's control. Among the lines included in the delayed delivery count were lines delivered or at least proffered by AT&T which USTS chose not to use. USTS includes no information about the average length of the delays of which it complains or about the number of orders it placed in the test months as compared to the number of orders it placed during non-test months.

SPC provides no data to suggest that AT&T is delaying delivery of ENFIA lines to inflate the billed minute factor. Indeed, the figures it provides for "number of circuits on order which should have been in service"[3] shows a steady and substantial decline during the 3 month study period. (See WP-93 in SPC's Report and Initial Comments) Moreover, if, as SPC claims AT&T unreasonably delays deliveries all year-round, rather than adjusting the billed minute factor, the more appropriate remedy for affected OCCs would be to take action under §§207 or 208 of the Communications Act, 47 U.S.C. §§207-08, to recover all damages suffered as a consequence of AT&T's failure to interconnect.

Even if it could be shown that AT&T had intentionally delayed deliveries, the parties did not include any provision in the ENFIA agreement which would call for an adjustment to the monthly ENFIA Line count to compensate for delayed deliveries, deliberate or otherwise. Nor can one reasonably infer from the

[3] SPC never specifies its criteria for determining when circuits "should be in service."

Table 3

| RAW MINUTES FOR THREE MONTHS (2 MTS WATS) Uncontested Exclusions and Adjustments: | *MCI* | *Change From Raw Min.* | *SPC* | *Change* | *USTS* | *Change* |
|---|---|---|---|---|---|---|
| | 806,865,788 | | 358,107,160 | | 88,737,050 | |
| Intrastate Minutes (Texas) | 63,155,879 | -7.8 | 8,247,732 | -2.3% | 4,181,070 | -4.7% |
| Independent Telco ENFIA | Unknown | — | 6,397,537 | -1.8% | 1,095,874 | -1.2% |
| Resold MTS/WATS | 2,659,350 | -0.3% | None | | 1,232,678 | -1.4% |
| Intracompany Use and Testing | (Already Deleted from Raw Minutes) | — | 1,251,585 | -0.2 | 6,350,797 | -7.2% |
| Rounding | — | — | 18,514,140 | -5.2% | 4,273,172 | -4.8% |
| Billing Adjustments (and Uncollectibles) | 71,034,857 | -8.8% | 45,479,609 | -12.7% | 13,228,250 | -14.9% |
| MINUTES OF USE LESS ALLOWED ADJUSTMENTS | 670,015,702 | -17% | 278,216,557 | -22.3% | 58,375,209 | -34.2% |
| (See Table 4) | | | | | | |
| Off-peak Adjustments | 156,512,204 | 19.4% | 80,050,863 | -22.3% | 13,910,419 | -15.68% |
| Net MOU | 513,503,498 | | 198,165,694 | | 44,464,790 | |
| Monthly Average | 171,167,833 | | 66,055,231 | | 14,821,597 | |

Table 4

Off-peak Adjustments

| | *MCI* | *SPC* | *USTS* |
|---|---|---|---|
| *Off-peak Minutes* | | | |
| 1. Evening | 186,410,328 | 117,377,263 | 25,618,386 |
| 2. Night | 136,580,121 | 55,166,587 | 6,105,109 |
| *Discounted Minutes* | | | |
| 3. Evening (L. 1 X .4) | 74,564,131 | 46,950,905 | 10,247,234 |
| 4. Night (L. 2 X .6) | 81,948,073 | 33,099,958 | 3,663,064 |
| 5. Total | 156,512,204 | 80,050,863 | 13,910,419 |

Source of lines 1 and 2:

MCI: letter of September 16, 1982 William J. Byrnes to Gary M. Epstein

SPC: SPRINT minutes - derived from WP–88. Initial Report, May 25, 1982 SPRINT LTD. minutes - letter of September 14, 1982 Mitchell F. Brecher to Gary M. Epstein

USTS: Volume 7 of Initial Report, May 25, 1982

contract language any intent that ENFIA rates be reduced when such delays occur.

C. Trouble Reports

SPC contends that when ENFIA circuits are out of service, the usage of other ENFIA is artificially inflated. It proposes to adjust for this by in effect increasing the reported circuits by adding unavailable circuits. It proposes this formula:

$$TPF = \frac{\text{Avail Circuits + Unavailable}}{\text{Available Circuits}}$$

According to SPC, this factor would be 1.0178, which would increase the average revenues per minute in SPC's methodology. AT&T calculates this as 1.7%.

AT&T states that this argument is invalid for the same reasons as the factor for delay. In addition, the out of service lines do not increase the MOU per line because SPC divides its total net minutes by all lines, not those in service. SPC's adjustment therefore is said to make no sense and to be in effect a double deduction.

SPC responds that without the adjustment it would be at the mercy of AT&T in having vital local facilities available. In addition, it claims that it receives no credit for outages of less than 24 hours. About 4.5% of lines are out of service each month, for an average of 9.5 hours a day by SPC figures. It must pay for these, it claims, yet load calls onto other lines.

SPC's argument on this point seems unfounded. Even if it must load extra traffic on some lines when others are down this does not affect the overall minutes per line so long as the down lines are also counted. If anything, the down lines will increase blockage and reduce billed minutes. If SPC wants to argue that it should get more credit for down time, it raises issues outside the scope of this proceeding which are irrelevant to minutes of use and would require changes in the tariff. It presents no evidence of abuse by AT&T.

Table 5

Disallowed Adjustments

| | | | | | | |
|---|---|---|---|---|---|---|
| Additional Exclusions and Adjustments as Proposed by OCCs (Based on 2 MTS - WATS) | | | | | | |
| Non-business, Non-business day | 349,946,350 | −43.4% | — | | | |
| Off-Peak Adjustment | — | — | 63,659,569 | −17.8% | 12,097,987 | −13.6% |
| SPRINT LTD | — | — | 21,067,630* | 5.9* | — | |
| Normalization | 15,927,500 | −2.0% | 5,801,630* | −1.6 | 730,224 | −0.8% |
| Seven Day Study Factor | — | — | 21,477,004 | −6.0% | — | |
| Billed Usage Lag | — | — | — | | 2,647,025 | −3.0% |
| Late ENFIA Delivery | — | — | 22,832,223 | −6.4% | — | −3.0% |
| Trouble Reports | — | — | 6,262,829 | −1.7% | — | |
| Total Additional Exclusions And Adjustments as Proposed by OCCs | 365,873,850 | −45.3% | 141,100,591 | 39.4% | 26,931,525 | −30.3% |

* Calculated by 2 × 10,533,815 (the off-peak adjusted SPRINT LTD minutes as reported in the SPC Report filed May 25, 1982, Ex. D. I).
** Calculated from USTS' Line on Order.

Conclusion

The effect of the allowed adjustments is shown in Tables 3, 4, and 6. The disallowed adjustments are shown in Table 5.

Table 6

Weighted Average OCC Billed MOUs per Enfia per Month

| | *Average Monthly MOUs* | *Average Monthly Number of Enfia Lines* | *Average MOUs per Enfia per Month* |
|---|---|---|---|
| MCI | 171,167,833 | 30,923 | 5,535 |
| SPC | 66,055,231 | 21,330 | 3,097 |
| USTS | 14,821,597 | 4,059* | 3,652 |
| TELTEC** | 647,106 | 179 | 3,615 |
| SATELCO*** | 438,287 | 86 | 5,096 |
| | 253,130,054 | 56,577 | |

Weighted Average OCC MOUs

Per ENFIA Per Month = 253,130,054 / 56,577 = 4,474

* Line Count in letter of March 19, 1982 from Randall B. Lowe to Gary M. Epstein, minus lines on order reported in June 4, 1982 letter from Lowe to Epstein. The line count includes ENFIA lines also used for Texas intrastate traffic.

** Letter of January 26, 1982 from Vonya B. McCann, Counsel to Gary M. Epstein; ENFIA line count from AT&T data.

*** Letter of February 25, 1982 from Vonya B. McCann, Counsel to Gary M. Epstein

Appendix C

*SEP Amount*

I. Introduction

The ENFIA Agreement specifies that rates for use of the jointly used subscriber plant element of ENFIA per minute of use are to be a percentage (Factor P) of the amount per minute calculated under the Separations Manual for the respective Bell System and GTE interstate MTS and WATS minutes of use (SEP Amount). When the agreement was first signed, the SEP Amount was set at $.055 per minute per circuit end. The agreement states that "it is anticipated that unless capped, this amount will increase each year, and that any change in this amount will be reflected in the tariff changes to be filed each year. . . ."[4] The SEP Amount was in fact subsequently increased to $.0568 in 1980 and $.0595 in 1981. Following the extension of the ENFIA Agreement, AT&T proposed a further increase to $.0658 per conversation minute of use, and the Commission has allowed this number to be used as a basis for the interim collection rate that is in effect pending the resolution of the current investigation into OCC billed minutes of use and AT&T's calculation of the SEP Amount.

AT&T submitted its report on the SEP Amount on May 17, 1982. The Report includes a brief descriptive summary of the methodology used and worksheets illustrating representative calculations for the State of Alabama.[5]

[4] ENFIA Agreement, paragraph 10, n. **.

[5] The rationale for the use of Alabama was that it is the first state alphabetically.

II. AT&T's Methodology

AT&T calculated the SEP amount to reflect Bell System costs of jointly used subscriber plant assigned to the interstate jurisdiction relating to interstate MTS and WATS during the period July, 1980 through June, 1981. In accordance with the formula outlined in the Agreed Tariff (para. 4(b)(2), Note 1(a)), AT&T divided Bell System interstate jointly used subscriber plant annual costs by Bell System annual interstate MTS and WATS conversation minutes of use. Several steps were required to achieve the resulting SEP amount.

First, AT&T identified the total subscriber plant book costs which are assigned to all message services (MTS/WATS and Exchange) for each study area from the December 1980 book costs used by each Bell Operating Company in each state for jurisdictional cost separations and division of revenues purposes. These costs include all types of station equipment, subscriber lines, and the non-traffic sensitive (NTS) portion of local dial plant.

Next, AT&T calculated subscriber plant factors (SPF) by developing a subscriber line usage (SLU) figure for each study area for July, 1980–June, 1981 and using the currently frozen values for CSR. A "Minutes of Use Timing Adjustment Factor" was employed to adjust SLU to reflect the fact that interstate holding times are measured on the trunk side of a switch while subscriber line use is measured on the line side. This factor apparently has been employed in separations since 1969. The calculated SPFs were applied to the identified book costs to yield subscriber plant book costs assigned to interstate for the period.

Then, AT&T developed "Annual Costs Factors" for the June, 1980—July, 1981 period in order to allocate annual expenses to each category of plant (station equipment, subscriber line, and local dial switching). These annual cost factors are not customarily used in separations procedures, and their use in calculating the SEP Amount was heavily criticized by the OCCs. Moreover, the calculations made to arrive at the annual cost factor for local dial switching involved the use of other "adjustment factors" which were not thoroughly explained. In its July 1, 1982 Response, AT&T answered the OCC criticisms and described the application of these adjustment factors. A "current-basic" ratio was employed to allocate "current" dollars in each expense account to plant categories in the same proportion as determined under a basic study performed sometime earlier. A rounding adjustment factor was applied to Depreciation Expense to correct for the discrepancies created by the disaggregation of depreciation expense into subcategories. In addition, AT&T employed an adjustment factor to Account 100.2 (Plant Under Construction) in order to determine the average total investment for the month to be allocated to plant construction subcategories. Finally, in its Response AT&T also submitted revised worksheets for the Alabama local dial cost factors, correcting arithmetic mistakes which had been noted by SPCC but which did not actually change the cost factor calculated for that plant category. AT&T applied the annual cost factors to the interstate December book costs for each plant category to arrive at total interstate annual costs of subscriber plant, the numerator of the SEP Amount fraction.

The denominator of the fraction was calculated by first determining the ratio of subscriber line toll conversation minutes to toll holding time minutes, including both originating and terminating MTS and WATS minutes, for each state. This ratio was then applied to MTS and WATS holding time minutes to derive interstate conversation minutes. The division of interstate annual subscriber plant costs by interstate conversation minutes produced the SEP Amount of $.0658.

Table 7

Summary of OCC Adjustments[3]

| | *SPCC* | *USTS* |
|---|---|---|
| AT&T SEP Amount | 0.0658 | 0.0658 |
| OCC SEP Amount | 0.363 | 0.0324 |
| Difference | 0.0295 | 0.0334 |
| *Adjustments* | | |
| 1. Non-OCC Served States | −0.0024 | −0.0024 |
| 2. Removal of Plant Investment | −0.0216 | −0.0137 |
| 3. 1.01 Point of Measurement Timing Factor | −0.0007 | −0.0007 |
| 4. Replacement of Interstate Rate of Return with Alabama Rate of Return | −0.0028 | −0.0040 |
| 5. Reduction of Annual Cost Factors | | −0.0102 |
| 6. Removal of 61% of General Services and License Contract Expenses | −0.0009 | |
| 7. Revision of Conservation Time Factor | | −0.0030 |
| 8. Other Adjstments | −0.0011 | |

[3]Quantified by AT&T.

## III. OCC Proposed Adjustments

### A. Removal of Plant Investment Inaccessible by OCCs

This adjustment is by far the most significant adjustment made by the OCCs to AT&T's SEP Amount. The adjustment is in two parts, first, the removal of plant investment (but not minutes) from those states not served by OCCs, and second, removal of subscriber plant investment (but not corresponding minutes) to compensate for the inability of OCCs to access certain switching equipment and rotary dial telephones.

It is argued that the SEP amount calculated on the basis of "Bell System Jointly Used Subscriber Plant" encompasses only that portion of Bell System non-traffic sensitive plant actually furnished to the OCCs in the provision of MTS/WATS-like services. This argument derives from the definition of "Jointly Used Subscriber Plant" set forth in the Agreed Tariff (p. 13, para. 2.6) as "the local nontraffic sensitive exchange telephone service plant furnished in connection with ENFIA provided to an OCC to complete an interstate call via an OCC's intercity network to or from exchange telephone service locations." AT&T argues that the two terms "Jointly Used Subscriber Plant," which relates to the end product of the Rate Element 3 formula, and "Bell System Jointly Used Subscriber Plant," which is an element of one of the factors in the formula, have separate and distinct meanings.

The OCCs have confused the plain meaning of "Bell System Jointly Used Subscriber Plant." The notion that the numerator of the SEP Amount was intended to include total Bell System data is supported by the explicit references in the Agreement (para. 10, n **) and the Agreed Tariff (;. 17, para. 4(b)(2), Note 1(a)) to

the use of Separations Manual results in the calculation of the SEP Amount. In addition, in its April 14, 1982 Order extending the ENFIA Agreement, the Commission discussed the appropriateness of using Separations results to derive the SEP Amount (para. 15). The Commission stated that, despite the shortcomings of the use of the separations process to measure the costs to be allocated among AT&T's interstate services, it was the best of available alternatives. The Commission also noted the recent approval of the United States District Court for the District Columbia for this same approach in the design of the Interim Cost Allocation Manual. *MCI v. FCC*, 675 F.2d 408, 415 (D.C. Cir. 1982). The Separations Manual does not require the development of costs by exchange or the separate identification of OCC related non-traffic sensitive costs. Therefore, the deletion of non-OCC related costs from the SEP Amount would require deviation from separations procedures and would undermine the purpose of the SEP Amount, which is to provide a measure of simulated Bell System interstate subscriber plant costs. Moreover, the inequalities of OCC interconnections are already accounted for in the P Factor, which results in a discount from simulated Bell System costs. The removal of non-OCC related costs from the SEP Amount would yield a double counting of the discount.

B. Removal of 1.01 Point of Measurement Timing Factor

As described in AT&T's methodology, the timing adjustment factor is customarily used in calculations of SLU to account for the use of subscriber lines before a call is switched to the toll trunk. SPCC and USTS argue that the adjustment factor should not be applied in the development of SLUs and that its use overstates the numerator of the SEP fraction. SPCC calculated the overstatement to be $62.5 million. SPCC also complained that the timing adjustment factor was inconsistently used, and that if it is employed in the numerator to allocate subscriber plant to interstate, it should also be used in the denominator to calculate interstate conversation minutes.

It is apparent that the timing adjustment factor is appropriate in the context of SLU calculations since the Separations Manual (para. 23.444(a)) requires that subscriber line use be measured on the basis of holding time minutes. However, the timing adjustment, which accounts for subscriber line use before a conversation has begun should not be used in the denominator of the SEP fraction since that number pertains only to conversation minutes.

C. Replacement of Interstate Rate of Return with Alabama State Rate of Return

Both SPCC and USTS contend that, since AT&T demonstrated the development of costs with Alabama data, the Alabama intrastate rate of return should be used rather than the Bell System interstate rate of return. SPCC calculated the Alabama rate of return at 8.65% and USTS calculated it at 8.14%. The Agreed Tariff plainly requires that the numerator of the SEP fraction include Bell System experienced interstate costs, including the interstate return. Therefore, the OCC adjustments for the use of an intrastate return are without merit.

D. Reduction of Annual Cost Factors

In conjunction with its removal of non-OCC investment costs, USTS adjusted the annual cost factors used by AT&T to reflect decreased expenses. Revisions were made to maintenance depreciation and general expense factors, as well as state, local and federal income tax factors. Since these adjustments are based on the erroneous assumption that non-OCC costs should be excluded from the SEP Amount, they should be disallowed.

E. Revision of Conversation Time Factor

USTS revised the calculation of conversation time to reflect the fact that the limited access of OCCs to Bell System Jointly Used Subscriber Plant reduces non-conversation holding time. This adjustment is unwarranted because the Agreed Tariff requires that the denominator of the SEP fraction reflect Bell System interstate conversation minutes for MTS and WATS. AT&T calculated conversation time by developing, in accordance with paragraph 23.444 of the Separations Manual, a ratio of total Bell System interstate MTS/WATS conversation minutes to total interstate MTS/WATS holding time minutes originating and teminating within a study area. The timing differences experienced by OCCs are not relevant to the calculation of Bell System conversation minutes, and should be adequately reflected in the OCCs' calculations of billed minutes of use.

F. Other SPCC Adjustments

SPCC believes that AT&T has inappropriately included exchange trunk circuit equipment (traffic sensitive) in the subscriber line circuit equipment (non-traffic sensitive) category. SPCC also claims that AT&T overallocated approximately $24.8 million in circuit equipment to Alabama's subscriber line plant. AT&T claims that no traffic sensitive circuit equipment was actually included in the line item for Alabama subscriber line circuit equipment, and that confusion may have arisen from the labeling on the DR form.

G. Removal of a Portion of General Services and License Contract Expenses

SPCC complains that AT&T has provided no assurances that the allocated expenses for "General Services and Licenses Contracts" (GS&L) are actually incurred for work related to non-traffic sensitive exchange services. SPCC believes that the proportion assigned to jointly used subscriber plant is extremely high and has excluded subaccounts not directly relating to the plant "furnished in connection with ENFIA" including Business Services, Network Planning and Design, Network Services, Public Relations, Legal, Administration (antitrust), Business Marketing, Interstate Antitrust and BTL billings. SPCC estimates that, after the exclusion of these subaccounts, only 39% of GS&L costs would be related to the provision of ENFIA facilities. These SPCC adjustments are unreasonable since, like the USTS Annual Cost Factor adjustments, they are based on the argument that non-OCC costs should be excluded.

Conclusion

In sum, none of the adjustments proposed by the OCCs are consistent with the calculation method for the SEP Amount contemplated in the agreement and tariff. To the extent that the OCC's present policy arguments might be relevant to whether the SEP Amount should be capped, they are considered in the body of this order.

## Dissenting Statement
## of
## Commissioner Joseph R. Fogarty

## In Re: Exchange Network Facilities for Interstate Access (ENFIA)

The ENFIA proceeding does not mark one of the Commission's finest hours. Since 1978 we have been going through muck and mire from one

bad compromise to an even worse one. With this Order we have finally reached the bottom. In an attempt to do "rough justice," the Commission has instead created a fantasy island, a creative piece from the theater of the absurd worthy of the best efforts of Arena Stage.

The action taken by the Commission is entirely result-oriented with only a tenuous basis in theory, record, and law. We are told that a rough justice compromise is necessary in order to ensure that the nascent competition which has developed in the MTS/WATS interstate market is not fatally curtailed.[6] First of all, this is not our job under the Act. *See PMS*, 71 FCC 2d 471, 521 (1979). Second, our role under the ENFIA contract is not that of a court of equity, but a court of law. With no indepedent ratemaking record before us, we can only construe and apply the plain terms of the contract. We have no authority to impose a vague and unsupported policy predilection "interpreting" the ENFIA contract.

The theory upon which the new ENFIA rate is prescribed is seriously flawed. First and foremost, the Order purports to prescribe the SEP amount based on a 1981 SEP figure of $.0595. However, the true 1981 SEP amount is $.0658, the figure prescribed on an interim basis. The Commission has prescribed the wrong SEP amount. This is clear error.[7]

The theory underlying the off-peak discount of OCC minutes is faulty. It finds no support in the settlements/division of revenues process. While the Order is correct in stating that the purpose of settlements/division of revenues is to distribute revenue, this revenue distribution, as well as the actual requirement on which the revenue pool is based, is based on the Interim Cost Allocation Manual (ICAM) and separations—not on AT&T's rate structure. If the new ICAM is effective, the size of the revenue pool should not vary significantly because of any MTS/WATS rate discounts. The purpose of the ICAM is to allocate to the interstate jurisdiction the total revenues, investment and expenses associated with that jurisdiction pursuant to jurisdictional separations procedures. *AT&T Manual and Procedures for the Allocation of Costs*, on reconsideration, at paragraph 13 (1981).[8] Under the ICAM, AT&T's MTS and WATS rates must earn the system-wide rate of return and must reflect the cost data generated by separations. *MCI v. FCC*, No. 81–1052 (D.C. Cir. filed April 13, 1982). The

---

[6] It appears that the Commission is in the anomalous situation of having adopted a compromise that the parties have rejected. I note that both AT&T and MCI have already appealed. *See* AT&T v. FCC, *appeal docketed*, No. 82–2199 (D.C. Cir., Oct. 7, 1982); MCI v. FCC, *appeal docketed*, No. 82–2194 (D.C. Cir., Oct. 7, 1982).

[7] In addition, I note that in the ENFIA Extension Order the Commission indicated that it would not be necessary to freeze the SEP amount as a consequence of the SPF freeze. Extension of ENFIA Agreement, 90 FCC 2d 6, 17 (1982) [ENFIA Extension Order]. This change in Commission position has not been explained adequately.

[8] The fact that the ICAM itself does not apply to ENFIA costs is irrelevant to this discussion because the order focuses on MTS/WATS rates to which the ICAM does apply in an attempt to draw an analogy.

rate discounts do not change the total revenue that the overall categories are required to earn and contribute to the revenue pool.[9]

Moreover, I do not believe that the Commission should approach the question of the proper calculation of the ENFIA charge from the perspective of AT&T's rate structure. As the Commission stated in the order accepting the ENFIA agreement:

> [T]he [ENFIA] agreement is patterned after the method by which local telephone companies are presently compensated for use of exchange facilities for traditional interstate MTS and WATS services. The basic methodology is one of compensating the local telephone companies for the costs they incur in carrying interstate MTS and WATS, and in adopting their facilities and procedures for carrying such calls. . . . This cost apportionment process, termed "jurisdictional separations," is then used as a basis for division of the interstate MTS and MTS revenues between the local telephone company and the interstate long-haul carrier (usually, but not exclusively, AT&T).

*Exchange Network Facilities (ENFIA)*, 71 FCC 2d 440, 444–45 (1979). Therefore, in determining the ENFIA rate, the Commission must look to how the interstate revenue pool is distributed based on expenses and investment. Any analogy to be drawn should be drawn from this procedure and not from AT&T's rate structure.

The calculations upon which the interstate revenue pool is distributed through the settlements/division of revenues process are not significantly sensitive to MTS/WATS off-peak discounts. Generally, the revenue pool is divided as follows. First, local companies are reimbursed for their interstate expenses based on separations studies. These costs are the same for each minute of interstate use (peak or off-peak). Then the remainder of the revenues in the pool is divided on the basis of the investment each local company has assigned to the interstate jurisdiction based on separations allocations and reflects the overall interstate rate of return. Although the amount of revenue to be divided is affected by AT&T's rates, the manner in which the pool is allocated is not.

Since I can find no basis in the settlements/division of revenues process to support an off-discount for OCC MOUs, I must believe that the true purpose of the discount is to hold down artificially the ENFIA rate according to the "rough justice" slogan. As such, it is not legally supportable. The OCCs have already been allowed to continue to benefit from a questionable 55% discount.[10] This further discount is invalid and beyond the scope of the Commission's role under the ENFIA Agreement. The other reductions of OCC minutes are valid, and the Commission should have stopped there.

---

[9] If, in fact, the off-discounts caused the MTS and WATS categories to contribute significantly less to the revenue pool than required under the ICAM, then the question of whether the discounts were discriminatory under Section 202(a) would be presented.

[10] *See* Dissenting Statement of Commissioner Joseph R. Fogarty, Extension of ENFIA Agreement, 90 FCC 2d 6, 20–22 (1982).

It appears once again that hard cases do in fact make bad law. My only hope is that the Commission will be able to rectify its error by June 1983, the earliest date by which the Commission will be in a position to prescribe access charges.

October 7, 1982

CONCURRING STATEMENT
OF
COMMISSIONER ANNE P. JONES

IN RE: AMERICAN TELEPHONE AND TELEGRAPH COMPANY AND THE BELL SYSTEM OPERATING COMPANIES TARIFF FCC NO. 8 (BSOC 8), TRANSMITTAL NO. 53, AND EXCHANGE NETWORK FACILITIES FOR INTERSTATE ACCESS (ENFIA), CC DOCKET 78–371

The transition to an increasingly competitive telecommunications industry has brought with it difficult problems of adjustment for both the industry and the FCC. Among the most difficult of these transitional problems has been determining the price of access to local exchange carriers by the other common carriers. The ENFIA agreement represented an industry compromise designed to accommodate the entry of competitive carriers in the market for switched telecommunications services following the Court decisions on "Execunet." The "rough justice" embodied in the ENFIA agreement established an interim charge for access to local exchange plant by the other common carriers. While not fully satisfactory to any party, the agreement did inject some needed stability and certainty into the switched services market that facilitated business planning by both AT&T and the other common carriers and provided a basis for continued market development.

Much has been learned since the ENFIA agreement was signed in December of 1978. The other common carriers have experienced substantial growth as their services have found increasing acceptance by both business and residential users. The public interest benefits of multiple carriers providing switched telecommunications services of diverse quality and price are no longer in doubt. In recent years a consensus has emerged on Capitol Hill that the Commission's open entry, procompetitive policies provide the proper foundation for restructuring the Communications Act of 1934. The issue is no longer whether multiple intercity carriers should interconnect with local exchange carriers but at what price they should do so. Additionally, the Modification of Final Judgment agreed to by the Department of Justice and AT&T and recently approved by the Court both affirms and supports the Commission's long-held policies favoring expanded entry into telecommunications markets.[11]

[11] Modification of Final Judgment in *United States v. AT&T*, D.C. Civil Action No. 82–0192 (August 24, 1982).

Neither the present, broad-based policy consensus on telecommunications competition nor the structural reorganization of AT&T could have been predicted during the late 1970's. Thus, the ENFIA tariff now seems almost an anachronism. Its terms and conditions embody a vision of the industry that in just over three years has become archaic. Yet the Commission's discretion in harmonizing ENFIA—an artifact of the transition to competition—with contemporary views of sound public policy toward the telecommunications industry appears quite restricted. The pricing certainty embodied in ENFIA, a major strength of the tariff during a highly uncertain period in the history of the industry, has become, paradoxically, its major weakness as emerging competition, which the ENFIA agreement encouraged, creates inexorable pressure toward cost-based pricing.

I concur, therefore, with the Commission majority which finds AT&T's tariff filed under Transmittal No. 53 unlawful. The new rate of $183.46 per ENFIA line which AT&T must file in its ENFIA tariff revision carries forward the Commission's rough justice philosophy toward the interim pricing of network access. Yet, I believe the Commission's decision also reflects the emerging economic reality that tariffs based on costs derived from jurisdictional separations are not sustainable in a competitive environment and are increasingly inconsistent with the Commission's goals of encouraging entry and innovation in telecommunications markets.

Thus, the Commission's decision in my view reflects not a trend in the future pricing of network access, but rather a judicious weighing of evidence, law, and policy within the narrow context of the ENFIA agreement and tariff. The future of network access pricing is found not in ENFIA but in Docket 78–72, Phase I.[12] In this important common carrier docket a consensus seems to be emerging in support of the Commission's "Pure II" option for the pricing of local exchange access. This option provides guidelines for the efficient pricing of network access that promotes efficient usage of both local exchange and long distance telecommunications facilities. If Pure II is eventually adopted by the Commission, it seems likely that existing ENFIA-type interconnections to local exchange facilities will be priced at a rate less than the ENFIA rate just ordered by the Commission. I look forward to early consideration by the Commission of the Common Carrier Bureau's recommendations in this important docket. Unlike the Commission's decision in the ENFIA tariff, its decision in Docket 78–72 will foreshadow both the direction and extent of further market entry and innovation for the 1980's and determine how efficiently ratepayers will utilize the nation's massive investment in telecomunications facilities.

---

[12] *Fourth Supplemental Notice of Inquiry and Proposed Rulemaking*, MTS-WATS Market Structure Inquiry, CC Docket 78–72, 90 FCC 2d 135 (1982).

## Concurring Statement of Commissioner Mimi Weyforth Dawson

RE: Exchange Network Facilities for Interstate Access (ENFIA) Bell System Operating Companies Tariff FCC No. 8

This decision concludes the Commission's investigation into AT&T's proposed rate increases for ENFIA facilities. The order finds AT&T's proposed rate increases to be unreasonable and prescribes a rate that is five dollars per line per month higher than our interim prescription of $178.46. Unfortunately, as I had predicted in my prior concurring statement, this investigation has shed no light on the real issue of how costs should be allocated efficiently.

The major variation that the Commission has added to the ENFIA dispute is a discount of the OCCs' off-peak minutes. Of course, such an approach continues the anomaly of applying a traffic sensitive measure to non-traffic sensitive plant. In fact, the inappropriateness of such an approach is highlighted when one considers that the theoretical justification for peak/off-peak pricing is that peak usage requires expansion of plant and thereby imposes greater costs on the system.[13] However, peak load traffic does not, nor for that matter does any other traffic, impose any additional costs upon carriers for non-traffic sensitive plant.

It appears that the Commission will settle the question of the efficient allocation of non-traffic sensitive plant in the access charge proceeding. Nevertheless, the increase in OCC charges for ENFIA takes on an even more peculiar specter in light of the fact that the vast majority of commenters in that proceeding advocates elimination of all NTS costs to interstate carriers. Such an outcome is feasible, even in the short run, whether or not the Commission goes directly to a fixed monthly charge for interstate NTS plant.[14] I do not mention this possibility necessarily as an endorsement of the concept, but rather to put the Commission's order today into perspective.

I believe the most difficult task for the Commission to resolve in the access charge proceeding concerning the disparity in interconnection arrangements and costs for the OCCs is to develop a plan which provides the Bell Operating companies and the independent telephone companies the incentive to provide equal interconnection for all carriers. The Commission must be careful to tie any reduction in the discount for the OCCs to an improvement in interconnection arrangements provided to them.

---

[13] See, *e.g.*, O. E. Williamson, "Peak-Load Pricing and Optimal Capacity," *American Economic Review*, September 1966.

[14] For example, the Commission may opt initially for a small monthly fixed charge with the remainder of interstate NTS costs billed directly to the customer by the local telephone company either on a price per call or price per minute basis. All interstate NTS costs eventually could be billed directly to consumers through a fixed charge after an appropriate transition period.

The failure to address this issue is only one of many shortcomings of the current ENFIA proceeding. Nevertheless, because I do not believe the prescribed rate will be disruptive to the market, I concur. Potential new entrants in the long distance telecommunications industry will have to wait until the access charge proceeding is completed to receive any clear guidance from the Commission on efficient cost alllocation methodology.

Amateur Radio Service
Amateur Radio Service, Technical Standards
Amateur Station, Beacon Operation

Petitions for rule making granted to extent specified and otherwise denied. Commission specifically defines "beacon operation" in the rules and authorizes automatic control of stations in beacon operation.
—*Beacon Operation*
PR Docket No. 81–823

FCC 82–455

**BEFORE THE**

# FEDERAL COMMUNICATIONS COMMISSION

**WASHINGTON, D.C. 20554**

| | |
|---|---|
| In the Matter of | |
| Beacon Operation in the Amateur Radio Service. | PR Docket No. 81–823<br>RM–3474<br>RM–3522 |
| Petition for Rule Making to Authorize Automatic Control of Beacon Operations. | RM–3877 |

REPORT AND ORDER
(PROCEEDING TERMINATED)

Adopted: October 21, 1982; Released: November 2, 1982

BY THE COMMISSION: COMMISSIONER RIVERA ABSENT.

1. On November 24, 1981, the Commission adopted a Notice of Proposed Rule Making[1] in the matter of *Beacon Operation in the Amateur Radio Service*. That Notice was in response to two petitions for rule making which request changes in the rules governing amateur radio station transmissions made for the purposes of ". . . measurement of emissions,

[1] 46 FR 60859, Decembewr 14, 1981.

temporary observation of transmission phenomena . . . and similar experimental purposes."[2] The first petition, RM–3474, submitted by the Johns Hopkins University Applied Physics Laboratory Amateur Radio Club (APLARC), seeks amendment of the Amateur Radio Service Rules (Part 97) to classify such transmissions as "Beacon Operation" and ". . . to permit unattended automatic control of amateur stations engaging in 'Beacon Operation' under specific provisions." The second petition, RM–3522, submitted by Charles Spencer *et al.*, requests that the Amateur Radio Service Rules be amended to require that an amateur radio station engaging in such transmissions cease operation ". . . upon notification by the Commission (that the transmissions are) causing undue interference."

2. In its Notice of Proposed Rule Making, the Commission specifically proposed to classify beacon operation as a form of amateur radio operation defined in the Rules and to permit automatic control of amateur radio stations in beacon operation. It was also proposed to limit beacon operation, whether manually or automatically controlled, to certain portions of the amateur radio frequency bands above 28 MHz. The Commission proposed to authorize the use of only A0, A1, F0 and F1 emission types on frequencies below 450 MHz and to limit the frequency shift of F1 emissions to less than 900 Hz. A transmitter power input limitation of 100 watts was proposed for stations in beacon operation along with additional requirements for station identification to be made once each minute during operation, using a special "beacon" designator. Finally, the proposed rules inlcuded a provision prohibiting beacon operation on more than one frequency in the same band, from the same location, and a provision explicitly stating that the Commission could order the termination of any beacon operation it might deem improper. (This latter provision also explicitly delegated such authority to the Engineers-in-Charge of Commission field facilities.)

3. Virtually all of the comments on the Notice support the Commission's proposal, however there are requests for modifications. By far the greatest objection to a specific aspect of our proposal concerns our choice of frequencies for beacon operation in the 28.0–29.7 MHz frequency band. We had selected the frequencies 28.08–28.10 MHz to authorize for beacon operation since this was consistent with the frequency range requested by RM–3474 and since no widely recognized band plan addressing beacon operations in this band had come to our attention. However, virtually all of the comments recommend that we authorize the frequencies 28.20–28.30 MHz for beacon operation in place of those we had proposed.

4. The comments of the APLARC, petitioner in RM–3474, state, "since filing the petition, we have learned that the International Amateur Radio

---

[2] Section 97.89, paragraph (b) of the Commission's Rules.

Union (IARU) has established a segment beginning at 28.200 MHz for beacon operation." Typical of other remarks on this issue, the comments of the American Radio Relay League, Incorporated (ARRL)[3] state that replacing our proposed frequencies with the frequencies 28.20–28.30 MHz ". . . would also preclude interference to A1 transmissions which often substantially fill the 28.0–28.1 MHz portion of the amateur 28 MHz band." The ARRL continues that ". . . it would be desirable to have the entire 28.2–28.3 segment available for increased flexibility and to allow for the IARU International Beacon Project concept of cycling each beacon onto 28.2 MHz for a segment of time each hour so that a complete picture of propagation can be gained from monitoring a single frequency." The Commission is persuaded by the overwhelming support for this change and we are adjusting our final rules in this proceeding accordingly.

5. Also with regard to our proposals for band segments to be authorized for beacon operation, some commenters request additional changes. Some comments suggest that the frequencies we have selected to authorize for the bands above 29.7 MHz should be changed slightly and in some cases comments suggest that we should authorize more spectrum for beacon operations. We stated in our Notice in this proceeding that the frequencies we were selecting to propose were chosen to correlate with the widely accepted ARRL band plans. Each of the individual requests of the commenters would be at variance with those plans. Furthermore, the comments which request that we authorize additional spectrum offer no compelling evidence for those requests. Accordingly, in view of the fact that there is no consensus in the comments as to the most desirable approach to take on this issue, we feel compelled to reaffirm our decision to authorize only those frequencies which conform to the widely-accepted band plans. We believe that the amount and placement of spectrum that we are authorizing for beacon operations should at least be adequate for the foreseeable future. If at a latter time it appears that some additional adjustment is necessary, we will consider the issues then in the context of a new proceeding.

6. Most of the comments received on our Notice do not address our proposal to prohibit manually, as well as automatically, controlled beacon operations on frequencies other than those specifically designated. However, the few that do request that we reconsider that proposal. We had suggested such a restriction as a means ". . . to prevent beacon transmissions from being used to harass other operations . . . (this being) one instance of increased amateur-to-amateur malicious inter-

[3] The American Radio Relay League, Incorporated is an association of radio amateurs that has developed informal recommendations for situating compatible forms of operation on certain frequencies segregated from other, noncompatible forms of operation in each amateur band. These "band plans" have gained widespread acceptance by amateur opeators.

ference . . ." that we will not tolerate.[4] However the reply comments of the ARRL, typifying comments on this issue, state, "The Commission has stated honorable bases for such prohibition, but in the view of the League, the prohibition incidentally prevents some extremely important amateur activities which, it is believed, the Commission did not intend." The ARRL specifically cites propagation studies on frequencies below 28 MHz ". . . during short-term geophysical occurrences such as for example, eclipses of the sun and moon . . ." as being one case of such amateur activities. "Transmitter hunts" used ". . . to polish the direction-finding skills of amateurs and the development of equipment useful in detecting hidden or covertly operated transmitters. . . ." is cited as another example.

7. Specifically with respect to our concern over malicious interference, the ARRL reply comments state:

> The League is sympathetic to, and appreciates the Commission's concern over instances of malicious interference, occasionally perpetrated by means of pseudo-"beacon" operation. However, as recently shown by able Administrative Law Judge Kuhlmann,[5] the distinction between bona fide beacon transmissions and those reasonably calculated to interfere with normal transmissions of radio signals in violation of Sections 97.78 and 97.125 of the Amateur Radio Service rules is easily made in most cases.

While we are still concerned by the growth of malicious interference in the Amateur Radio Service, we are persuaded by the sentiment of these comments and will not place frequency restrictions on manually-controlled beacon operations.[6] However, we wish to reiterate that we will not stand idle when illegally-caused interference occurs and accordingly, we are including in the final rules a provision which will authorize the Engineers-in-Charge of the Commission's field facilities to order the cessation of beacon operation where ". . . the station is operating improperly or causing undue interference."

8. Most of the comments support our proposed power limitation for beacon operations, including those of the APLARC. However, in their comments, they state:

> With respect to power, we had proposed that 100 watts *output* be authorized for stations in Beacon Operation.[7] We did this feeling that output is a superior method of measuring RF power than is input. Nevertheless, from the standpoint of utility of beacons, there is little difference between the power we suggested and that proposed by the Commission. Therefore, other than to reiterate our contention with respect to

---

[4] Notice at paragraphs 7 and 10.

[5] See *GaryW. Kerr, 91* FCC 2d *110*, PR Docket 81–66, FCC 82D–24, Initial Decision of Administrative Law Judge Edward J. Kuhlmann, at Paragraphs 13 and 14. (Released April 5,;1982.)

[6] However, we are clarifying our control operator requirements forstations under automatic control as well as stations under manual control.

[7] Emphasis added.

the use of output as a measure of RF power, we have no comments relative to this portion of the subject docket.

9. The Commission is in agreement with this comment of the APLARC. We stated in our Notice that we were ". . . proposing a power input limitation since this would be . . . consistent with our current regulations regarding operating power measurements."[8] However, we are considering a complete revision of our regulations concerning power measurement techniques in a separate proceeding.[9] Our belief, as discussed in the Notice of that proceeding, is that power output is the superior measurement technique. Nonetheless, for the final rules of this proceeding, we are prescribing that the power of a station in beacon operation be measured in terms of input. We intend this as an interim measure until we have completed our findings in the proceeding dealing specifically with power measurement techniques. At that time we will reconcile the measurement specifications for beacon operations with our final decision in that proceeding.

10. The National Radio Astronomy Observatory (NRAO) and the Naval Research Laboratory (NRL) filed comments requesting that provisions be added to the rules for beacon operation to protect their operations from interference in the area known as the "National Radio Quiet Zone" ("NRQZ").[10] Their comments state, ". . . the Commission . . . now requires that proposals to establish Amateur Radio repeaters in the NRQZ must be coordinated with these Agencies before operation can commence.[11] The situation is similar here and demands like protection of these Agencies." They go on to state, "because amateur radio beacons operating in the VHF and UHF bands would often transmit for lengthy periods, in some instances 24 hours per day, 7 days a week for propagation and transmission purposes, the potential harmful interference is perhaps greater than for Amateur Repeaters." We concur that given these unique circumstances, protection for NRAO/NRL is warranted. We concur that given these unique circumstances, protection for NRAO/NRL is warranted. We are including in the final rules requirements for stations in beacon operation within the NRQZ which parallel those for stations in repeater operation.

11. Finally, the Commission received a petition for rule making, RM–3877 submitted by the Middle Atlantic FM and Repeater Council (T-MARC), on March 26, 1981. That petition requests that the Commission authorize automatic control of beacon transmitters in the Amateur

---

[8] Notice at paragraph 14.

[9] See Notice of Proposed Rule Making in PR Docket No. 82–624, FCC 82–410, Adopted September 1, 1982, Released October 1, 1982.

[10] The National Radio Quiet Zone is the area bounded by 39° 15′ N on the north, 78° 30′ W on the east, 37° 30′ N on the south and 80° 30′ W on the west.

[11] See Report and Order in SS Docket No. 78–352, 46 FR 21169, April 9, 1981.

Radio Service. Although the subject of that petition relates directly to the issues addressed in the Notice of this proceeding, it was filed too late for consideration in the Notice. On March 12, 1982, the Commission received a "petition for dismissal" of RM–3877 from T-MARC, the original petitioner. That petition requests dismissal of the original petition, provided that the original petition is associated with the proceeding as a formal comment. We have considered the requests of RM–3877 in the context of this proceeding and with the action we are now taking those issues are moot:—Consequently, in accordance with the request of T-MARC, we are dismissing their original petition.

12. Accordingly, IT IS ORDERED that effective January 3, 1983, Part 97 of the Commission's Rules and Regulations, 47 CFR Part 97, IS AMENDED as set forth in the attached Appendix. IT IS FURTHER ORDERED that to the extent specified herein, RM–3474 and RM–3522 ARE GRANTED, and in all other respects they ARE DENIED. IT IS FURTHER ORDERED that RM–3877 IS DISMISSED. IT IS FURTHER ORDERED that this proceeding IS TERMINATED. This action is taken pursuant to authority contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended. Further information on this matter may be obtained by contacting: Steve Lett, (202) 632-4964, Private Radio Bureau, Federal Communications Commission, Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico *Secretary*

Appendix

Part 97 of the Commission's Rules and Regulations, 47 CFR Part 97, is amended as follows:

1. In Section 97.3, paragraph (l) is revised to read as follows:

§ 97.3 Definitions.

* * * * *

(l) *Amateur radio operation.* Amateur radio communication conducted by amateur radio operators from amateur radio stations, including the following:

*Fixed operation.* Radio communication conducted from the specific geographical land location shown on the station license.

*Portable operation.* Radio communication conducted from a specific geographical location other than that shown on the station license.

*Mobile operation.* Radio communication conducted while in motion or during halts at unspecified locations.

*Repeater operation.* Radio communication, other than auxiliary operation, for retransmitting automatically the radio signals of other amateur radio stations.

*Auxiliary operations.* Radio communication for remotely controlling other amateur radio stations, for automatically relaying radio signals of other amateur radio stations in a system of stations, or for inter-communicating with other amateur radio stations in a system of amateur radio stations.

*Beacon operation.* One-way radio communication conducted in order to facilitate measurement of radio equipment characteristics, adjustment of radio equipment, observation of propagation or transmission phenomena, or other related experimental activities.

*Radio control operation.* One-way radio communication for remotely controlling objects or apparatus other than amateur radio stations.

* * * * *

2. Also in Section 97.3, the parenthetical sentence in paragraph (m)(3) is deleted.

3. In Section 97.61, paragraph (a) is revised and paragraph (e) is added to read as follows:

§ 97.61 Authorized frequencies and emissions.

(a) The following frequency bands and associated emissions are available to amateur radio stations for amateur radio operation, other than repeater operation, auxiliary operation and automatically-controlled beacon operation, subject to the limitations of § 97.65 and paragraph (b) of this section:

| *Frequency band* | *Emissions* | *Limitations (See paragraph (b))* |
|---|---|---|
| *(kHz)* | | |
| 1800–1900 | A1,A3 | |
| 1900–2000 | A1,A3 | 1,2 |
| 3500–4000 | A1 | |
| 3500–3775 | F1 | |
| 3775–4000 | A3,A4,A5,F3,F4,F5 | 4 |
| 4383.8 | A3A,A3J | 13 |
| 7000–7300 | A1 | 3,4 |
| 7000–7150 | F1 | 3,4 |
| 7075–7100 | A3,F3 | 11 |
| 7150–7300 | A3,A4,A5,F3,F4,F5 | 3,4 |
| 14000–14350 | A1 | |
| 14000–14200 | F1 | |
| 14200–14350 | A3,A4,A5,F3,F4,F5 | |
| 21000–21450 | A1 | |
| 21000–21250 | F1 | |
| 21250–21450 | A3,A4,A5,F3,F4,F5 | |
| 28000–29700 | A1 | |
| 28000–28500 | F1 | |
| 28500–29700 | A3,A4,A5;F3,F4,F5 | |
| *(MHz)* | | |
| 50.0–54.0 | A1 | |
| 50.1–54.0 | A2,A3,A4,A5,F1,F2,F3,F4,F5 | |
| 51.0–54.0 | A0,F0, | |
| 144.0–148.0 | A1 | |

| *Frequency band* | *Emissions* | *Limitations (See paragraph (b))* |
|---|---|---|
| 144.1–148.0 | A0,A2,A3,A4,A5,F0,F1,F2,F3,F4,F5 | |
| 220–225 | A0,A1,A2,A3,A4,A5,F0,F1,F2,F3,F4,F5 | 5 |
| 420–450 | A0,A1,A2,A3,A4,A5,F0,F1,F2,F3,F4,F5 | 5,7 |
| 1215–1300 | A0,A1,A2,A3,A4,A5,F0,F1,F2,F3,F4,F5 | 5 |
| 2300–2450 | A0,A1,A2,A3,A4,A5,F0,F1,F2,F3,F4,F5,P | 5,8 |
| *(GHz)* | | |
| 3.300–3.500 | A0,A1,A2,A3,A4,A5,F0,F1,F2,F3,F4,F5,P | 5,12 |
| 5.650–5.925 | A0,A1,A2,A3,A4,A5,F0,F1,F2,F3,F4,F5,P | 5,9 |
| 10.000–10.500 | A0,A1,A2,A3,A4,A5,F0,F1,F2,F3,F4,F5 | 5 |
| 24.000–24.250 | A0,A1,A2,A3,A4,A5,F0,F1,F2,F3,F4,F5,P | 5,10 |
| 48.000–50.000 | A0,A1,A2,A3,A4,A5,F0,F1,F2,F3,F4,F5,P | |
| 71.000–76.000 | A0,A1,A2,A3,A4,A5,F0,F1,F2,F3,F4,F5,P | |
| 165.000–170.000 | A0,A1,A2,A3,A4,A5,F0,F1,F2,F3,F4,F5,P | |
| 240.000–250.000 | A0,A1,A2,A3,A4,A5,F0,F1,F2,F3,F4,F5,P | |
| Above 300.000 | A0,A1,A2,A3,A4,A5,F0,F1,F2,F3,F4,F5,P | |

* * * * *

(e) The following amateur frequency bands and emissions are available for automatically-controlled beacon operation: 28.20–28.30 MHz, 50.06–50.08 MHz, 144.05–144.06 MHz, 220.05–220.06 MHz, 222.05–222.06 MHz and 432.07–432.08 MHz using type A0, A1, F0, F1, or A2J emissions (when type F1 or A2J emissions are employed in these bands, the radio or audio frequency shift, as appropriate, shall be less than 900 Hz); all amateur frequency bands above 450 MHz using emission types authorized under paragraph (a) of this section. Limitations of paragraph (b) of this section apply.

4. In Section 97.67, paragraph (e) is added to read as follows:

§ 97.67 Maximum authorized power.

* * * * *

(e) Within the limitations of paragraph (b) of this section, the power input to the transmitter final amplifying stage of an amateur radio station in beacon operation shall not exceed 100 watts, exclusive of power for heating the cathode of a vacuum tube(s).

5. In Section 97.79, paragraph (b) is revised to read as follows:

§ 97.79 Control operator requirements.

* * * * *

(b) Every amateur radio station, when in operation, shall have a control operator. The control operator shall be present at a control point of the station, except when the station is operated under automatic control. (Automatic control is only permitted where specifically authorized by the rules of this part.) The control operator may be the station licensee, if a licensed amateur radio operator, or may be another amateur radio operator with the required class of license and designated by the station licensee. The control operator shall also be responsible, together with the station licensee, for the proper operation of the station.

* * * * *

6. In Section 97.84, paragraph (d) is revised and paragraph (d)(3) is added to read as follows:

§ 97.84 Station identification.

* * * * *

(d) When an amateur radio station is in repeater, auxiliary or beacon operation, the following additional requirements shall apply:

* * * * *

(3) When identifying by radiotelephony, a station in beacon operation shall transmit the word "beacon" at the end of the station call sign. When identifying by radiotelegraphy, a station in beacon operation shall transmit the fraction bar DN followed by the letters "BCN" or "B" at the end of the station call sign. This station identification shall be made at intervals not to exceed one minute during any period of operation.

* * * * *

7. A new section, § 97.87, is added to read as follows:

§ 97.87 Beacon operation.

(a) A station in beacon operation shall not concurrently operate on more than one frequency in the same amateur frequency band, from the same location.

(b) A station in beacon operation, either locally controlled or remotely controlled, may also be operated by automatic control when devices have been installed and procedures have been implemented to ensure compliance with the rules when the duty control operator is not present at a control point of the station.

(c) Beacon operation shall cease upon notification by any Engineer-in-Charge of a Commission field facility that the station is operating improperly or causing undue interference to other operations. Beacon operation shall not resume without prior approval of the Engineer-in-Charge.

(d) The licensee of an amateur radio station, before modifying an existing station in automatically-controlled beacon operation in the National Radio Quiet Zone, or before placing his/her station in automatically-controlled beacon operation in the National Radio Quiet Zone, shall give written notification thereof to the Director, National Radio Astronomy Observatory, P.O. Box 2, Green Bank, West Virginia 24944. Station modification is any change in frequency, power, antenna height or directivity, or the location of the station. In such cases, the rules of § 97.85(f)(1), (2) and (3) shall apply.

8. In Section 97.89, paragraph (b) is revised to read as follows:

§ 97.89 Points of communications.

* * * * *

(b) Amateur radio stations may transmit one-way signals to receiving apparatus while in beacon operation or radio control operation.

9. Section 97.91 is revised to read as follows:

§ 97.91 One-way communications.

In addition to beacon operation and radio control operation, the following kinds of one-way communications, addressed to amateur stations, are authorized and will not be construed as broadcasting: (a) Emergency communications, including bona fide emergency drill practice transmissions; (b) Information bulletins consisting solely of subject matter having direct interest to the amateur radio service as such; (c) Round-table discussions or net-type operations where more than two amateur stations are in communication, each station taking a turn at transmitting to other station(s) of the group; and (d) Code practice transmissions intended for persons learning or improving proficiency in the international Morse code.

Advertising, False, Misleading, Deceptive
Comparative Hearing
Cross-Interest
Ownership Multiple
Review by Review Board
Transmission First Local

Review Board affirmed Initial Decision; granted television construction permit to applicant with substantial integration preference over competitor with slight diversification preference. Preferred stockholder interests given slight diversification weight but cause no cross ownership or cross interest problem. Central city and contiguous suburb found to be one community for Sec. 307(b) purposes. —*Cleveland Television Corp.*

BC Docket
No. 80–425

FCC 82R–62

**BEFORE THE**

# FEDERAL COMMUNICATIONS COMMISSION

**WASHINGTON, D.C. 20554**

| | |
|---|---|
| In re Applications of | |
| CLEVELAND TELEVISION CORPORATION<br>Cleveland, Ohio | BC Docket<br>No.80–425<br>File No.<br>BPCT–5149 |
| CHANNEL 19, INC.<br>Shaker Heights, Ohio | BC Docket No.<br>80–426<br>File No.<br>BPCT–5242 |
| For a Construction Permit for a New Commercial Television Station | |

*Appearances*

*Robert L. Heald, Robert J. Rawson, Vincent J. Curtis, Jr.*, and *David N. Sternlicht*, on behalf of Cleveland Television Corporation; *Ben C. Fisher*,

*David D. Oxenford*, and *Samuel Miller*, on behalf of Channel 19, Inc.; and *Arthur I. Steinberg* and *Charles W. Kelley*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

## DECISION

Adopted: October 4, 1982; Released: October 14, 1982.

BOARD MEMBER JACOBS FOR THE REVIEW BOARD: BOARD CHAIRMAN MARINO ISSUING A SEPARATE STATEMENT; BOARD MEMBER BLUMENTHAL CONCURRING WITH STATEMENT.

1. This proceeding involves the mutually exclusive applications of Cleveland Television Corporation (CTC) and Channel 19, Inc. (Channel 19) for authority to construct a new UHF commercial television station to operate on Channel 19 in Cleveland, Ohio (CTC) or the contiguous suburb of Shaker Heights (Channel 19). By Hearing Designation Order, Mimeo No. 34292, 45 Fed. Reg. 53871, published August 13, 1980, their applications were designated for hearing to determine the extent of common ownership, operation and control between Cleveland Stations WHK and WMMS(FM) and the proposed Channel 19 television station and whether said ownership would be in the public interest; to determine pursuant to Section 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 307(b), which of the proposals would better provide a fair, efficient, and equitable distribution of radio service;[1] and, in the event that a choice between the applicants should not be based solely upon considerations relating to Section 307(b), to determine on a comparative basis which proposals would better serve the public interest. By Memorandum Opinion and Order, FCC 81M–917, released March 31, 1981, presiding Administrative Law Judge (ALJ) John H. Conlin added a false and deceptive promotional practices issue against Channel 19.

2. In an Initial Decision (I.D.), released April 12, 1982 (FCC 82D–25), the ALJ granted the Channel 19 application. In reaching this result, he resolved the common ownership and promotional practices issues favorably to Channel 19, determined that neither proposed community of license was preferred under Section 307(b), and concluded that Channel 19 was the superior applicant under the comparative issue. The proceeding is now the before the Review Board on exceptions filed by CTC and the Broadcast Bureau. Channel 19 has filed limited exceptions and supports the Initial Decision. Reply briefs have been filed by all of the parties. The

---

[1] Section 307(b) requires the Commission to "make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

Board has reviewed the Initial Decision in light of the exceptions and briefs, the oral argument held July 23, 1982, and our examination of the record. We adopt the findings of fact in the Initial Decision, except as modified herein, and affirm the ALJ's ultimate conclusion that a grant of the Channel 19 application will better serve the public interest, convenience and necessity.

3. *Common Ownership.* This potentially disqualifying issue revolves around the indirect ownership interest of Malrite of Ohio, Inc. (Malrite), licensee of Cleveland Stations WHK and WMMS(FM), in the Channel 19 application. Channel 19's signal will encompass all of Cleveland. The common stockholders of Channel 19 are Norman Wain and Robert Weiss d/b/a Metroplex Communications (Metroplex) (100 shares) and Diamond Broadcasting, Inc. (Diamond) (100 shares), and the preferred stockholders are Milton Malz (67 shares), Carl E. Hirsch (30 shares), and John R. Wilson (3 shares). I.D., Findings, paras. 5–6; Channel 19 Exh. 2. The latter three men own virtually all the shares of Malrite (I.D., Findings, paras. 7–8; CTC Exh. 12, p. 2), and their Channel 19 preferred stock represents one-third of the capital contribution into Channel 19. I.D., Findings, para. 8. The preferred stockholders of Channel 19 will be non-voting passive investors only, will not be officers or directors, and will not be responsible for or involved in the operation of the station. I.D., Findings, paras. 11–12. The ALJ resolved the common ownership issue favorably to Channel 19, based on his finding that the Malrite stockholders own only non-voting preferred stock in Channel 19 and have no rights affecting control of the proposed station. I.D., Conclusions, para. 5.

4. In its exceptions, CTC urges that the ALJ should have disqualified Channel 19 under the AM-FM-TV cross-ownership prohibitions of Section 73.636 of the Commission's Rules, 47 CFR 73.636, because the Malrite stockholders own and control Stations WHK and WMMS(FM) and, although preferred stockholders, exercise considerable control over Channel 19. The Broadcast Bureau, which believes that Channel 19 failed to satisfy its burden of proof to show that this cross-ownership arrangement would serve the public interest and that the Malrite principals have not been effectively insulated from participation in Channel 19 station affairs, concurs with CTC. In its reply, Channel 19 asserts that its indirect ownership relationship with Malrite does not violate the multiple ownership rules; hence, it need not show that the relationship would serve the public interest as a prerequisite for qualification as an applicant.

5. We affirm the ALJ's resolution of this issue. Generally, the Commission prohibits the grant of a television permit to an applicant that already directly or indirectly owns, operates, or controls an AM or FM broadcast station in a community that would be encompassed by the Grade A contour of the proposed television station. Section 73.636(a)(1) of the

Rules, 47 CFR 73.636(a)(1). Note 8 of this rule provides, however, that applications for UHF television stations "will be handled on a case-by-case basis in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest." As the ALJ correctly pointed out, the notes explaining the rule define cognizable ownership interests in terms of voting control. See Notice of Inquiry, *Amendment of Multiple Ownership Rules*, 68 FCC 2d 1302, 1305 (1978). And in *Evening Star Broadcasting Co.*, the Commission expressly held that "ownership of preferred stock will not invoke the strictures of the multiple ownership rules absent contingent control rights." 67 FCC 2d 318, 324 (1978).

6. Based on the record in this case, the Board agrees with the ALJ that the preferred stock ownership by the Malrite group involves insufficient incidents of contingent control of Channel 19 to violate the multiple ownership rules. The stock in question is non-voting except to the extent Ohio state law requires that preferred stockholders vote on certain extraordinary corporate acts. I.D., Findings, para. 13; Conclusions, para. 4. But these limited voting rights, concerning such matters as changes in the Articles of Incorporation or amendments that affect or alter the value, class or terms of the prefered stock, are not such as to convey any meaningful control over corporate management. Likewise, although the preferred stock is convertible into common shares, the right of conversion may not be exercised for five years and even then only if conversion would not violate any Commission rules. I.D., Findings, para. 14. And the right to alienate the preferred stock is restricted both by the right of first purchase retained by the corporation and its common stockholders and by the bar on transferees converting non-voting preferred into voting common stock without the prior approval of the common stockholders. I.D., Findings, paras. 14–15; Conclusions, para. 4. These limitations further reduce the likelihood that the Malrite principals will influence Channel 19's operation. Although the Bureau argues in its brief that nothing in Channel 19's Articles of Incorporation prohibits the Malrite principals from becoming more active in the policies and operation of the station, this concern is not based on record evidence but purely on the speculative assumption that the Malrite principals could, not example, be elected to and serve on the Board of Directors of Channel 19 and thereby influence its daily affairs. We cannot rely on such unsupported assumptions, particularly in light of the aforenoted evidence showing specifically how these individuals are isolated from corporate management. Similarly, CTC's emphasis on the predictive implications of earlier activities of the Malrite principals in Channel 19 corporate planning and decision-making prior to conversion of their stock to preferred shares in 1979 is conjectural and does not itself establish any continuing involvement on their part. Also, CTC's claim that Channel 19 could have taken further steps to avoid the

issue, such as having the Malrite principals withdraw completely, is quite beside the point since it assumes, incorrectly we believe, that the steps it has already taken are inadequate. In sum, we reject CTC's charge that "the preferred stock scheme is a transparent sham to circumvent Commission rules and policies" (Br. at para. 38), because of the absence of convincing evidence challenging the bona fides of Channel 19's revisions in its ownership structure and its implementation. All is speculation and surmise. We will not inquire into the motives underlying compliance with the Commission's rules and policies; we expect it.[2] The ingredients of sham found in *Henderson Broadcasting Co., Inc.*, 63 FCC 2d 419, 39 RR 2d 1099 (Rev. Bd. 1977), cited by CTC, are absent here.

7. The exceptors also point to the substantial investment of the Malrite group in Channel 19 as indicative of its potential corporate influence. Specifically, the Malrite group has a one-third equity position in Channel 19 (represented by its preferred stock), Milton Maltz has agreed to personally guarantee one-third (Metroplex will guarantee the remainder) of a $216,670 bank loan to Diamond, and Maltz also has offered to lease three pieces of studio equipment to Channel 19. Channel 19 Exh. 1, pp. 7–9. Despite this investment, the Malrite group is not committed to render any services to Channel 19, and the applicant has no responsibility to accept any advice from them. *Id.* at 8. Furthermore, while financial leverage is important in determining control, *WLOX Broadcasting Co.* v. *FCC*, 260 F. 2d 712 (D.C. Cir. 1958); *Henderson Broadcasting Co., supra*, we believe such influence is unlikely in this case because the common stockholders of Channel 19 have a two-thirds equity position and are seasoned businessmen with a substantial amount of previous broadcast experience. I.D., paras 35–41. Thus, there is little likelihood and no evidence that they need or intend to rely on the Malrite principals for guidance.

8. At oral argument (Tr. 520–523), CTC raised a question not directly addressed in its exceptions, that is, whether the facts of record present a violation of the Commission's cross-interest policy. That policy extends the common ownership prohibition of Section 73.636 to "individuals who are principals of an applicant and who have some meaningful relationship with an existing facility of the same type serving substantially the same area." *Guy S. Erway*, 90 FCC 2d 750, 752, 48 RR 2d 829, 830 (Rev. Bd. 1980); *K. & M. Broadcasters, Inc.*, 19 FCC 2d 947, 17 RR 2d 543 (Rev. Bd. 1969). The objective of the policy is to "promote and maintain full competi-

---

[2] The Bureau requests that, if the Channel 19 application is granted, the Board make clear that a waiver of Section 73.636(a)(1) of the Rules will be required before any of the Malrite principals can become an officer, director, or member of Channel 19's Executive Committee. Br. at 8 n.7. Without addressing the question of waiver at this time, the Board will require Channel 19 to inform the Commission of any substantial change in the role of the Malrite principals at the station, prior to its occurrence, so that any potential cross-ownership implications may be considered.

tion between such facilities." *Erway, ibid.* We disagree that the cross-interest policy is applicable here. First, we note that the Commission did not designate and CTC did not seek a cross-interest issue in this case. While it may be argued that such an issue is subsumed within the common ownership issue that was designated, Commission precedent firmly establishes that because of the basic qualifications and related due process implications of the cross-interest policy, it may only be explored in the context of a specifically designated issue. *See, e.g., Atlantic Broadcasting Co. (WUST),* 5 FCC 2d 717, 8 RR 2d 991 (1966). Thus, CTC's argument has not been properly raised in this proceeding and is procedurally defective. Second, and more importantly, even if we were to construe CTC's presentation as a request for enlargement of the issues or as a proffer of proof that the Malrite relationship with Channel 19 violates the Commission's cross-interest policy, it would fail.

9. The cross-interest policy is grounded in concern over "the potential for conflict of interest, unfair competition, and detriment to the public interest" inherent in certain types of business relationships. *Eastern Broadcasting Corp.*, 30 FCC 2d 745, 755, 22 RR 2d 472, 483 (Rev. Bd. 1971). Attention has generally focused on broadcast stations in the same service, *e.g., K. & M. Broadcasters, Inc., supra* (two AM stations), but occasionally a cross-interest question has been explored where different services in the same geographical area involved, *e.g., Lexington County Broadcasters, Inc.*, 42 FCC 2d 581, 28 RR 2d 353 (Rev. Bd. 1973) (wife of principal of FM applicant had job-related access to confidential information about existing AM station). However, in all instances the essential threshold question remains the same—whether "specific allegations of fact" have been made which show that the allegedly prohibited cross-interest would be contrary to the public interest. *Atlantic Broadcasting Co. (WUST), supra,* 5 FCC 2d at 718, 8 RR 2d at 993. As already indicated in paragraphs 6 and 7, *supra,* CTC's allegations are not supported by factual evidence, but only by surmise and conjecture; these are insufficient tools to invoke the dread disqualification consequences of the cross-interest policy. And we decline to rule, as a matter of law, that the non-voting preferred stockholder relationship that exists between Channel 19 and the Malrite principals is *ipso facto* a prohibited cross-interest. No authority is cited for such a proposition, and we decline to extend the scope of the cross-interest policy on the basis of the insubstantial arguments offered. *Compare Carolina Broadcasting Service, Inc.*, 25 RR 515 (1963) (key employee role in A and 33% ownership of B held prohibited cross-interest), *with Morris, Pierce and Pierce,* 88 FCC 2d 713, 50 RR 2d 959 (Rev. Bd. 1981) (Board declines to extend cross-interest policy to encompass mere creditor relationships). In short, the facts discussed in the preceding paragraphs show inadequate indicia of control to make the

Malrite group's "relationship" with Channel 19 sufficiently "meaningful" to raise a legally cognizable cross-interest inference.

10. In conclusion, the record as a whole demonstrates that the Malrite group, by virtue of its ownership of only non-voting preferred stock, will not retain the means to directly or indirectly control Channel 19. Consequently, the Channel 19 application does not contravene the multiple ownership rules as a matter of basic qualifications. However, the Malrite stock ownership does have some adverse comparative impact under the diversification criterion of the standard comparative issue, which will be discussed in that context in paragraph 18, *infra*.[3]

11. *Section 307(b).* By virtue of the facts that CTC and Channel 19 propose to locate their antennas on the same tower and operate at the same height and power, both applicants will cover the identical areas and populations. I.D., Findings, para. 17; Conclusions, para. 6. However, CTC proposes Cleveland as its community of license whereas Channel 19 proposes the contiguous suburb of Shaker Heights which, like Cleveland, is located in Cuyahoga County. I.D., Findings, paras. 18–19, 27. Shaker Heights and Cleveland are politically independent municipalities and Shaker Heights is about one-twentieth the size of Cleveland, is more affluent, has a relatively much smaller minority population, and has no local television station (or broadcast station of any kind) whereas Cleveland has one non-commercial and four commercial television stations plus numerous AM and FM facilities. I.D., Conclusions, para. 8. The ALJ held, in view of the proximity of the cities, their relative size, and the identical coverage of the proposed operations, that neither applicant merited a Section 307(b) preference because both proposed in reality to

---

[3] CTC also excepts to the ALJ's acceptance of Channel 19's August 26, 1980 post-designation amendment in Memorandum Opinion and Order, FCC 80M–2237, released November 5, 1980, his failure to condition acceptance of Channel 19's Exhibit 4 (Tr. 80–84), and his failure to accept CTC's Exhibit 17 in Order, FCC 81M–688, released March 10, 1981. We deny these exceptions. Because the August 26 amendment, which contained the applicant's amended Articles of Incorporation, was timely filed in response to the designation of the basic qualifying common ownership issue against Channel 19, it was properly accepted under Section 73.3522(b)(2) of the Rules, 47 CFR 73.3522(b)(2). *See Azalea Corp.*, 31 FCC 2d 561, 22 RR 2d 909 (1971); *Fisher Broadcasting Co.*, 30 FCC 177, 179 (1961). Since the amendment merely clarified Channel 19's pre-designation proposal for the Malrite stockholders to own preferred rather than common stock, it resulted in no comparative improvement because the comparative consequences of preferred stock ownership in this case had already attached. *See Anax Broadcasting, Inc.*, p 87 FCC 2d 483, 488, 49 RR 2d 1589, 1593–4 (1981). Channel 19's Exhibit 4, which contained the amended Articles of Incorporation for hearing record purposes, was indeed accepted without CTC's condition that no comparative advantage be obtained by Channel 19. However, it is clear that the ALJ did not confer any comparative advantage on Channel 19 because of the Exhibit. *Id.*; I.D., Conclusions, para. 19. CTC's proffered Exhibit 17, which shows that the Cleveland law firm of Baker and Hostetler, which had prepared an amendment to Channel 19's Articles of Incorporation (Tr. 267), had been used recently by Malrite, is wholly insufficient to demonstrate any control by the Malrite stockholders over Channel 19. Therefore, rejection of the amendment was not prejudicial, and CTC's exception is decisionally insignificant.

serve the same larger community—Cleveland and its environs. I.D., Conclusions, paras. 10–11.

12. In their exceptions, Channel 19 and the Bureau argue that the ALJ erred in failing to give Channel 19 a preference for proposing a first local transmission service for Shaker Heights. CTC replies that the ALJ correctly determined that metropolitan Cleveland is the one actual "community" proposed to be served by both applicants and, consequently, no preference should be awarded. For the reasons that follow, we agree with the ALJ and CTC. In applying Section 307(b)'s "fair, efficient, and equitable" standard, the Commission has traditionally looked to the relative needs of the respective service areas for a new reception service and the needs of the proposed communities of license for a new transmission service. *Kent-Ravenna Broadcasting Co.*, 44 FCC 2603, 22 RR 605 (1961); *WHW Enterprises, Inc.*, 89 FCC 2d 799, 808, 51 RR 2d 409, 415 (Rev. Bd. 1982). These principles are reflected in the first three priorities underlying the Commission's television Table of Assignments: (1) To provide at least one television service to all parts of the U.S.; (2) To provide each community with at least one television broadcast station; (3) To provide a choice of at least two television services to all parts of the U.S. *Television Assignments (Sixth Report and Order)*, 41 FCC 148, 167 (1952). Since the applications will cover precisely the same areas and populations, their reception aspects (priorities 1 and 3) will be equally well satisfied by a grant to either applicant. The critical question, then, is whether Channel 19 merits a preference for proposing a first local transmission service (priority 2), and that determination depends in turn on the concept of "community."

13. Perhaps the best statement of Commission policy in this regard is found in *St. Louis Telecast, Inc.*, 22 FCC 625, 712–13, 12 RR 1289, 1369 (1957):

> It is axiomatic that before 307(b) considerations, if applicable, can be applied to a proceeding involving mutually exclusive applications, it must be determined that there are in fact separate communities competing for the facility. In the past, the concept of communities within the meaning of Section 307(b) has not been limited to municipalities, but in any given case has been determined by a combination of circumstances. The type of facility sought, the coverage each applicant would provide and the location and importance of the municipality in relation to nearby cities and towns have been among the factors considered in determining the applicability of 307(b). See *Huntington Broadcasting Co.* v. *FCC*, 192 F. 2d 33, 7 R.R. 2030; *Rossmoyne Corp.*, 7 R.R. 117; *Huntington Broadcasting Co.*, 5 R.R. 721; *Pawtucket Broadcasting Co.*, 4 R.R. 1345. In cases involving mutually exclusive applicants from a principal city and a contiguous suburb, it has been held that where both applicants propose to serve substantially the same areas and populations the term "communities," as used in this section of the Communications Act, is not limited in meaning to "municipalities" but may include metropolitan areas.

We believe that these principles are controlling here. The applicants will provide identical coverage from virtually identical facilities, and Shaker

Heights, although a municipality, is also a contiguous suburb of Cleveland and one-twentieth its size. Thus, Channel 19, which seeks the Section 307(b) preference, had to establish on the record that Shaker Heights was significantly independent from Cleveland to be considered a separate community for Section 307(b) purposes. *See RKO General, Inc. (KHJ-TV)*, 5 FCC 2d 517, 519, 8 RR 2d 957, 960 (Rev. Bd. 1966); *Fidelity Television, Inc.* v. *FCC*, 515 F. 2d 684, 694 (D.C. Cir. 1975). It failed to do so.

14. Channel 19's reliance on cases such as *Pasadena Broadcasting Co.* v. *FCC*, 555 F. 2d 1046 (D.C. Cir. 1977) and *WHW Enterprises, Inc., supra*, 89 FCC 2d at 810–11, 51 RR 2d at 417, to support a Section 307(b) preference is misplaced for two reasons. First, unlike this case, the existence of separate and distinct communities for Section 307(b) purposes was adequately demonstrated in those cases and, second, those cases did not involve television applications. Television stations, unlike radio, are not divided into classes depending on the size of their coverage areas, and the allocations scheme for television *(Sixth Report and Order, supra)* specifically provides for central cities with large populations to have multiple channel assignments. Cleveland has six. Television stations typically serve much larger areas than radio stations, involve considerably greater capital investments, and require larger audiences to attract more advertising revenues. Beyond these differences, the number of television channels available is much more limited and, consequently, the television service area for Section 307(b) purposes "should be defined in terms of coverage and not in terms of artificial political boundaries." *Evening Star Broadcasting Co.*, 27 FCC 2d 316, 321 n. 4, 20 RR 2d 1311, 1321 n. 3a (1971), *aff'd sub nom. Stone* v. *FCC*, 466 F. 2d 316 (D.C. Cir. 1972). Therefore, television stations-unlike FM broadcast stations—are generally considered as providing "an areawide, rather than a localized service." *St. Louis Telecast, Inc., supra*, 22 FCC at 713, 12 RR at 1369. These special considerations strengthen our conclusion that only one large "community" is being applied for by the applicants in this case—metropolitan Cleveland. We, therefore, affirm the ALJ's ruling declining to award a Section 307(b) preference to either applicant. We now proceed to the standard comparative analysis of the applicants.

15. *Diversification of Control of the Media of Mass Communications.* Half of the common stock of Channel 19 will be owned by Metroplex Communications, a partnership owned equally by Norman Wain and Robert Weiss, who will be directors and officers of the applicant. I.D., Findings, para. 5. Together they are general partners with a 97% interest in a partnership that wholly owns the licensees of Stations KEZK(FM), St. Louis, Missouri; WCKX(FM), Clearwater, Florida; WHYI(FM), Fort Lauderdale, Florida; and WHTT, Miami, Florida. I.D., Findings, para. 41. They also together own 93.75% of the sole general partner of the

licensee of Stations WVKX(FM), Woodbridge, Virginia, and WPKX, Alexandria, Virginia. *Id.* In addition, the preferred stockholders of Channel 19 own the licensee of Stations WHK and WMMS(FM), Cleveland, and are stockholders, officers, and directors of a corporation which controls Stations KEEY AM/FM, St. Paul, Minnesota; WZUU AM/FM, Milwaukee, Wisconsin; WNYR(AM) and WEZO(FM), Rochester, New York; WCTI-TV, New Bern, North Carolina; WAWS-TV, Jacksonville, Florida; and which owns all of the non-voting stock of Crown Broadcasting Corporation. *Id.* at n. 10. They are also officers, directors, and stockholders in the licensees of Stations WUHF(TV), Rochester, New York, and WFLX(TV), West Palm Beach, Florida. *Id.* CTC's president and 20% stockholder, Aben E. Johnson, Jr., owns 56.9% of the stock of the licensee of Station WXON-TV, a UHF independent station in Detroit, Michigan. I.D., Findings, paras. 4, 34. Douglas Johnson, a 10% stockholder and vice-president of CTC, is also an officer and director of the WXON-TV licensee. *Id.* Clifford Beresh, a 10% stockholder and officer of CTC, is the sales manager at WXON-TV. *Id.*

16. The ALJ first weighed the media interest attributed to CTC against the more numerous but more geographically distant interests of the Channel 19 commoon stockholders and found that CTC would be entitled to a slight preference. I.D., Conclusions, para. 18. Then, relying on *Robert M. Zitter*, 59 FCC 2d 274, 37 RR 2d 299 (Rev. Bd. 1976), he additionally considered the media interests of Channel 19's non-voting preferred stockholders and concluded that CTC's preference for diversification should be raised to moderate. I.D., Conclusions, paras. 18–19.

17. In its exceptions, CTC claims that the ALJ gave insufficient weight to the various media holdings of the Channel 19 principals and that it is entitled to a decisive preference for diversification. Channel 19 also excepts and argues that neither applicant should receive a diversification preference because the interest attributed to CTC in a Detroit television station is as significant as the Channel 19 interests in radio stations far from Shaker Heights and because the interests of the Channel 19 preferred stockholders should be given no weight.

18. The Board finds that CTC is entitled to a slight diversification preference. The media interests of Channel 19's common stockholders in four FM stations and two AM stations. located in Missouri, Florida, and Virginia, are more numerous than the single interest attributable to CTC's stockholders in a Detroit UHF television station. And the percentage of ownership interest by the Channel 19 common stockholders represents a somewhat greater degree of control than the ownership and management roles in the Detroit UHF station by CTC's stockholders. *See Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394, 5 RR 2d 1901, 1908 (1965). In the Board's view, however, two factors significantly offset these advantages. First, CTC's stockholder interest in

the Detroit TV station, since it is in the same type of service that is the subject of this proceeding, is a more significant media interest per se than the aural broadcast station interests of Channel 19's owners. Second, the Detroit station is more significant as a regional broadcast interest because Detroit is only about 100 miles from Cleveland whereas the closest Chanel 19 common stockholder-owner broadcast interests are in Virginia, some 400 miles away. I.D., Conclusions, n. 20, para. 17 *see generally Policy Statement, supra*, 1 FCC 2d at 395, 5 RR 2d at 1909. On the other hand, we must also give appropriate weight to the preferred stock interests of the Malrite principals. Since these persons are effectively isolated from management and control of Channel 19's proposed station (see paragraphs 6–7, *supra*), we do not believe that overall diversification of control of the mass media is meaningfully affected by their nominal presence among Channel 19's owners. *Cf. Anax Broadcasting, Inc., supra*, 87 FCC 2d at 488, 49 RR 2d at 1593–4 no comparative integration consideration given to passive investors who have no authority to control the licensee). But, as in *Zitter, supra*, 59 FCC 2d at 279, 37 RR 2d at 305, "we are somewhat reluctant to ignore completely" persons who own non-voting stock in an applicant. Although the non-voting nature of the Malrite group's preferred stock interests in Channel 19 substantially negates the effect of the various Malrite interests across the U.S., including the two Cleveland radio stations, we believe nevertheless that they do carry some slight weight. *Compare Greater Wichita Telecasting, Inc., 90* FCC 2d 1046, FCC 82R–45, 51 RR 2d 1604, 1606 and n. 3 (Rev. Bd. 1982) (slight merit but no basic integration credit given for local equity owners who are limited partners in the applicant) *with Bradley, Hand, and Triplett*, 89 FCC 2d 657, 51 RR 2d 383 (Rev. Bd. 1982) (integration credit not diminished because of presence among applicant's principals of non-integrated and non-voting preferred stockholders). In short, while CTC is somewhat to be preferred under this factor, we do not find that a grant to either applicant will significantly further the Commission's objective of a maximum diffusion of control of the media of mass communications and conclude, therefore, on balance, that CTC is entitled to only a slight preference.[4]

19. *Integration of Ownership and Management.* Aben E. Johnson, Jr., CTC's 20% shareholder, plans to devote 20 hours per week to the proposed station. He will aid in the employment and training of the staff, supervise other officers and management personnel, help in program development, and be ultimately responsible for station operation. I.D., Findings, para.

[4] Because we have found the Commission's cross-interest policy inapplicable to the facts of this case (see paragraphs 8–10, *supra*) no comparative demerit based on that policy is chargeable to Channel 19. But even if that policy were to apply here for comparative purposes, any comparative demerit emanating therefrom would be subsumed within the slight weight accorded the Malrite interests in paragraph 18.

29. He is an experienced broadcaster. I.D., Findings, para. 30. His son, Aben M. Johnson, who is a 10% stock subscriber in CTC, will serve at least 40 hours per week as chief engineer and program and operations manager. I.D., Findings, para. 31. He intends to move to Cleveland and has previous broadcast experience. *Id.* James M. McCombs, a 5% stock subscriber, will devote at least 40 hours per week as general manager of the proposed station. I.D., Findings, para. 33. He is a black resident of Shaker Heights and has had extensive broadcast experience. *Id.* Augustus L. Harper, a 10% stock subscriber, also black, will be "actively involved in the daily operation" of the station, but no amount of time therefor has been specified. I.D., Findings, para. 32. The ALJ credited CTC with 15% full-time (McCombs and Aben M. Johnson) and 20% part-time (Aben E. Johnson, Jr.) integration. I.D., Conclusions, para. 12. He disallowed Harper's participation proposal because it was too indefinite. *Id.* CTC's integration proposal was qualitatively enhanced by the broadcast experience of the two Johnsons and McCombs, the younger Johnson's plans to move to Cleveland, and the minority status and local residence of McCombs and Harper. I.D., Conclusions, para. 14.

20. Hubert Payne, Channel 19's president and director, owns a majority interest in Diamond and will vote Diamond's 50% common stock interest in the applicant. I.D., Findings, paras, 5, 35. He is a black civically-active local resident with broadcast experience who will work more than 40 hours per week as general manager of the proposed station. I.D., Findings, paras. 35, 37. The Metroplex partnership owns the remaining 50% of Channel 19's common stock. I.D., Findings, para. 36. Robert C. Weiss and Norman Wain are general partners, each having a 50% interest in Metroplex, and will work at the station at least 20 hours per week—Weiss as sales director and Wain as promotion director. *Id.* They both reside in the Cleveland metropolitan area, are civically involved, and have broadcast experience. I.D., Findings, paras. 39–40. The ALJ quantitatively credited Channel 19 with 50% full-time integration for Payne's participation and 50% part-time integration for the involvement of Weiss and Wain; he further credited the applicant with qualitative enhancements for the long-time local residence, civic activities, and broadcast experience of Payne, Weiss, and Wain, and for integrating Payne, a black 50% owner, as full-time general manager. I.D., Conclusions, paras. 13–14. The ALJ concluded that Channel 19 was markedly superior to CTC on both quantitative and qualitative integration and that therefore a "decided preference" should be awarded Channel 19. I.D., Conclusions, para. 15.

21. In its limited exceptions, Channel 19 objects to the award of full-time and part-time integration credit to CTC for the participation of McCombs and Aben E. Johnson, Jr., respectively. It alleges that McCombs has had little real connection with the CTC application or with any of the applicant's principals and that therefore it is unlikely that he will

truly have a meaningful role at the station. It also points to the fact that McCombs' maintenance of a 5% stock interest in CTC is dependent on his continued employment there (if he leaves, he must resell his stock to the corporation) and that he is not a director or an officer as further indications that his ownership interest is tenuous at best. We reject these arguments as speculative, because there is no record evidence to show that CTC does not actually intend for McCombs to serve at the station in his proposed role, that it intends to fire McCombs, or that McCombs is not capable of or seriously interested in carrying out his proposed role at the station. *See Webster-Baker Broadcasting Co.*, 88 FCC 2d 944, 951–2, 50 RR 2d 1142, 1148 (Rev. Bd. 1982). Channel 19 attacks Johnson's 20–hour per week proposal as too speculative because Johnson has not committed himself to move from Detroit to Cleveland, has an unclear role at the station and no specified staff position, and might curtail his commitment after the station becomes operational. We also reject this argument. Johnson clearly testified that he would be available 20 hours a week for a period of years in Cleveland as well as in Detroit (Tr. 196) and his commitment, in our view, contains sufficient specificity to entitle it to the minimal part-time credit claimed. *See Greater Wichita Telecasting, Inc., supra*, at 1607–8. We therefore fully credit CTC's proposal. Nevertheless, noting that CTC did not challenge the ALJ's evaluation of Channel 19's integration proposal (except to the extent indicated in paragraph 23, *infra*) or his award of a "decided preference" to Channel 19 (see CTC Reply Br. at n. 2), which we equate with a substantial preference, and fully crediting CTC with 15% full-time/20% part-time integration plus some qualitative enhancements, compared with Channel 19's 50% full-time/50% part-time proposal with substantial qualitative enhancements, we affirm the ALJ's conclusion. Channel 19 is entitled to a substantial integration preference because its proposal represents integration of 100% of those with voting power, as opposed to far less than 50% for CTC, and because of the clearly superior qualitative enhancements that Channel 19's owners possess. These factors boost the overall integration credit accorded to Channel 19 above the moderate preference which would otherwise be justified. *See Scott & Davis Enterprises, Inc.*, 88 FCC 2d 1090, 50 RR 2d 1251 (Rev. Bd. 1982) (moderate preference awarded where quantitative integration credit was 55% versus 30%—both fulltime only—and qualitative enhancements were essentially equal).

22. *Promotional Practices Issue.* Channel 19 principals Weiss and Wain acquired Station WCKX(FM), Clearwater, Florida, in September 1980. I.D., Findings, para. 43. Shortly thereafter, based on market research in which some participants referred to WCKX as their "number one station," a promotional campaign was launched describing the station as "Tampa Bay's New #1 FM." *Id.* However, audience surveys did not recognize WCKX as the top rated station in the market at that time. *Id.*

Billboards began appearing in late September reading "96 KX—Tampa Bay's New #1 FM," with the words "Tampa Bay's" and "FM" printed in dark blue and the phrase "New #1" printed in bright orange. I.D., Findings, para. 44. The coloring scheme was designed, according to Weiss, to suggest that the station would be the "future number one station for listeners." *Id.* The phrase was also used on business cards, certain promotional material, and in on-the-air promotional announcements. *Id.* After a competitor's complaint led to discussions among Weiss, Wain, and their Washington counsel, the promotional campaign was halted, the "#1" claim was removed from all promotional material, and the billboards were repainted by the end of October. I.D., Findings, para. 45. In late 1980, Arbitron Radio ratings were released showing that WCKX had the highest rating for the adult 18–34 age group in the Monday-Sunday, 6:00 a.m.-midnight time period, for the Tampa-St. Petersburg market. I.D., findings, para. 46. Subsequently, until May 12, 1981, WCKX broadcast announcements in which it identified itself as "Metro Tampa's #1 contemporary music station, 96 KX." I.D., Findings, para. 47. WCKX also broadcast every three or four hours, during a one-week period at the end of 1980, an announcement that claimed that WCKX had become "the new number one contemporary music station in the Tampa/St. Petersburg metro listening area." *Id.* The ALJ concluded that the September-October 1980 promotional campaign slogan was "an unfortunate one . . . [that] cannot be condoned," but this was an isolated occurrence without decisional significance; as to the late 1980 announcements based on the Arbitron ratings, he found that they were not unfair or inaccurate and were therefore without decisional significance. I.D., Conclusions, paras. 20–22.

23. In its exceptions, CTC claims that Channel 19 should have been assessed a comparative demerit for its deceptive promotional prctices and that the alleged misconduct should substantially erode the qualitative enhancements credited to Channel 19 for integrating Weiss and Wain into station management positions. We disagree. The late 1980 promotion was adequately based on the results of an independent ratings report by Arbitron and cannot be characterized as unfair on inaccurate. *See WAVI Broadcasting Corp.*, 32 FCC 2d 421, 22 RR 2d 1106 (1971). As for the earlier promotion, which *was* inaccurate and indicated bad judgment on the part of management, there is no record evidence showing that the promotion was intentionally misleading. Moreover, after an irate competitor complained, immediate corrective action was taken. Under these circumstances, we agree with the ALJ that the September-October promotional campaign is properly viewed as an unfortunate albeit isolated event, without decisional significance, that occurred just after WCKX was acquired by Weiss and Wain, and we affirm the ALJ's deter-

mination that the challenged promotional practices should have no disqualifying or comparative effect in this proceeding.

24. *Final Comparative Evaluation.* All exceptions having decisional significance have been considered by the Board. We have affirmed the ALJ's conclusion that neither applicant warrants a "community" preference under Section 307(b) of the Communications Act because the two proposed communities of license effectively form part of a single larger community—"metropolitan Cleveland." And by affirming the ALJ's conclusions on the common ownership and promotional practices issues, and resolving CTC's cross-interest policy argument favorably to Channel 19 on our own motion, we confirm that Channel 19 is basically qualified to be a Commission licensee and does not warrant any comparative demerits. Thus, the ultimate choice of a grantee here hinges on the standard comparative issue. Under the diversification criterion, we have concluded that CTC is entitled to only a slight comparative preference. On the other hand, Channel 19 warrants a substantial integration preference, based on its proposal to integrate 100% of its ownership into management on a day-to-day basis, including as full-time general manager a black civically-active local resident with broadcast experience who controls 50% of Channel 19's voting stock, compared with CTC's proposed 15% full-time and 20% part-time integration. While diversification normally is the decisive preference in comparative evaluations, this is not always the case. As the Commission recently held in *Gilbert Broadcasting Corporation*, FCC 82–415, *91* FCC 2d *450*, released September 22, 1982, at para. 59, "a diversification advantage may be outweighed by a more significant integration advantage." Accord, CJL Broadcasting, Inc., 88 FCC 2d 750, 760, 50 RR 2d 1159, 1167 (Rev. Bd. 1981). In the instant case we conclude that Channel 19's integration preference—and all it bodes for the "best practicable service" to the public—is sufficiently substantial to overcome CTC's slight diversification advantage and to warrant our affirmance of the ALJ's ultimate conclusion that a grant of Channel 19's application will better serve the public interest, convenience, and necessity.

25. ACCORDINGLY, IT IS ORDERED, That the Petition for Leave to Amend filed by Cleveland Television Corporation on May 28, 1982 IS GRANTED, and the amendment IS ACCEPTED; and

26. IT IS FURTHER ORDERED, That the application of Channel 19, Inc. (File No. BPCT–5242) for a construction permit to establish a new television broadcast station at Shaker Heights, Ohio IS GRANTED, and the application of Cleveland Television Corporation (File No. BPCT–5139) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Jerold L. Jacobs

*Member,* Review Board

STATEMENT OF BOARD MEMBER NORMAN B. BLUMENTHAL CONCURRING *DUBITANTE*

By dint of the fact that the Commission's rules (47 CFR §73.636) and a very recent Commission decision (*see* discussion of *Anax Broadcasting*, n.2, *infra*) seem dispositive of the point that licensee equity holdings in the nature of limited partnership or preferred stock shares are not, generally, ownership interests in which the Commission is particularly concerned, I concur—though not without apprehension. The misgivings arise because, despite the fact that the Commission has continuously held that diversity of ownership of broadcast stations is the comparative factor of "primary significance,[1] we somehow come away in this case granting the mutually exclusive television license to the applicant which is 33% owned by Malrite of Ohio, Inc., which concurrently owns 100% of two radio stations (WHK and WMMS-FM) in the very same community and denying the application of the competing party who has no existing interests in the community.

The majority believes its result is compelled, in the main, by breach of the rules which prohibit the grant of a license "if such party directly or indirectly owns, operates, or controls" another AM or FM station within the predicted Grade A contour of the TV station. *See* Section 73.636(a)(1) of the Rules. As noted, Malrite, a 1/3 owner of the Channel 19 applicant, owns completely two existing Cleveland radio stations. But, two factors appear to mitigate the strength of the prohibition as applied to the case at bar. First NOTE 8 of the aforesaid rule relieves the absolute bar if the desired television station is a UHF facility: such "cases will be handled on a *case-by-case* basis. . . ." *Id.* (Emphasis added.) Moreover, as the Board's decision notes (para. 5), the Commission held that "ownership of preferred stock will not invoke the strictures of the multiple ownership rules absent control rights." *Evening Star Broadcasting Co.*, 67 FCC 2d 318, 324 (1978).[2] Thus, because Malrite is a preferred stockholder, it would appear that no absolute prohibition obtains to their substantial equity interest in Channel 19.

If the rules themselves were the final word on this aspect of the Commission's attempt to assure diversity, it would be game, set and

---

[2] The Commission's emphasis on licensee "control" as represented by equity interests which include only "voting rights is illustrated by the recent *Anax Broadcasting Co., Inc.*, 87 FCC 2d 483, 488 (1981), where the Commission held that limited partners are "passive investors" whose interests are "inconsequential" for integration purposes because they have no management voice. *But see Greater Wichita Television, Inc.*, FCC 82R–45, released July 30, 1982 (Rev. Bd.), where two limited partners *did* have important management positions.

[3] The majority decision cites *Eastern Broadcasting Corp.*, 30 FCC 2d 745 (Rev. Bd. 1971); *K & M Broadcasters, Inc.*, 19 FCC 2d 947 (Rev. Bd. 1969); *Lexington County Broadcasters, Inc.*, 42 FCC 2d 581 (Rev. Bd. 1973).

match to Channel 19. But, a protest has been lodged by Cleveland Television, the competing applicant, who accurately notes that the Commission's cross-ownership rules have a qualifying cross-interest corollary. In straight language, the Board has said that the cross-interest policy extends the prohibitions of §73.636 to "individuals who are principals of an applicant and who have some *meaningful relationship* with an existing facility of the same type serving substantially the same area." *Majority Decision*, at para. 8, *citing Guy S. Erway*, 90 FCC 2d 750, 752 (Rev. Bd. 1980; emphasis added).

In paragraphs 8 and 9 of its decision, the majority lists additional cases wherein an applicant's role or position at a nearby station is evaluated to determine whether that applicant is to be disqualified based on that relationship.[3] Because the cited cases are not Commission decisions, it has been implied that—in the parlance of our trade—the cross-interest policy is simply "Review Board Law." However, that implication is expressly belied by the Commission's *en banc* ruling in *Carolina Broadcasting Service*, 25 RR 515, 516 (1963), wherein it specifically cited its "long-standing cross-interest policy" as grounds for rejecting an application.

The test developed for identifying a prohibited cross-interest is whether there is a "meaningful relationship" between the applicant and another station in the relevant locale. While the Board majority does not go so far as to say that Malrite's 33% interest does not constitute the requisite "meaningful relationship," it slips the operative question by holding—without much explanation—that the relationship here is not "sufficiently 'meaningful' to raise a legally cognizable cross-interest inference." *Majority Decision*, at para. 9. With all due respect, while the adjectival modification supplied by the term "sufficiently" is sufficiently squishy, this extra linguistic layer is about as illuminating as a damp matchstick at RFK Stadium with all the field lights on—at high noon. Its semantic dismissal of cross-interest factors becomes particularly dissatisfying when it is noted that a prime concern of the cross-interest policy is to "promote and maintain full competition between such facilities." *Majority Decision*, at para. 8, *citing Guy S. Erway, supra*, 90 FCC 2d at 752. In *Carolina Broadcasting Service, supra*, the Commission itself debarred an applicant even where there was no cross-ownership (as there is here) and where the only relationship between the applicant and an existing

---

[4] *See also Erway, supra*, where the Board invoked the cross-interest policy because of a mutual employeeship with an extant station and *Lexington County Broadcasters, supra*, where the same occurred because the wife of an applicant's principal might merely have access to the extant station's commercial data. The majority does not say exactly why Malrite's 33% interest in Channel 19 is not "sufficiently meaningful" or whether a 50%, 66% or 99% equity interest would supply the missing sufficiency with respect to full competition objectives. Nor does it say whether, by logical extension, a party could possess a 33% preferred equity position in every station in town without triggering agency concern under the arms-length competition thrust of the cross-interest policy.

station was that a partial principal of the applicant was a "salesman and part-time announcer (one hour daily)" at the station's auxiliary station 21 miles away in a different city. 25 RR at 515.[4] *Carolina* has not been overruled.

Inasmuch as the gravamen of the cross-interest policy is the assurance of "full competition," the key question on whether or not there is a "meaningful relationship" between an applicant's principals and an existing station is whether, in turn, Malrite's ownership interest in Channel 19 poses an impediment (or, at least, a disincentive) to vigorous,arms-length competition. Or, using the precedents as a guide, does the instant Malrite situation create any less concern than the relationships identified in the majority-cited, cross-interest cases?

Finally, and with due respect to the gallantry of Chairman Marino who, in his separate statement, attempts to shore up what is clearly the weakest block in this decision, I disagree with his view that Malrite's cross-interest with Channel 19 was not "in issue" in this case or that the parties lacked notice that Malrite's equity interest was to be considered. Indeed, the very first issue designated by the Commission was:

> 1. To determine with respect to Channel 19 the extent of common ownership, operation and control between stations WHK and WMMS (FM) and the proposed television station, and whether said ownership would be in the public interest. [I.D., para. 1]

The Commission could hardly do otherwise because, as noted, although radio station/UHF TV cross-ownership is not prohibited by virtue of NOTE 8 of § 73.636, that NOTE specifically states that such "cases will be handled on a case-by-case basis in order to determine whether common *ownership, operation* or *control* of the stations would be in the public interest." *Id.* (Emphasis added.)[5]

Both NOTE 8 of the rules and Issue 1 designated by the Commission enjoin public interest consideration of Malrite's ownership interest in Channel 19. To say that Commission's "long-standing cross-interest policy" (*Carolina Broadcasting, supra*) is not relevant to those public interest considerations mandated by NOTE 8 and Issue 1 or to say that the policy is not "in issue" may be drastic understatement. It *is* the issue. Thus, *Radio Athens, Inc.* v. *FCC*, 401 F.2d 398 (D.C. Cir. 1968), where the court remanded for hearing an application the Commission had summarily dismissed on cross-interest grounds, is plainly inapposite. The Chairman's preference to avoid the cross-interest conundrum on filmy procedural grounds more reminiscent of the 14th century is no more

---

[5] By phrasing its concerns in the disjunctive (*viz.*, "ownership, operation or control"), the elementary rules of construction compel a recognition that the Commission will look beyond "control" in NOTE 8 situations. Hence, Malrite's lack of voting control is not determinative.

[1] *Policy Statement on Comparative Hearings*, 1 FCC 2d 393, 394 (1965).

satisfying than our treatment in the decision. We must face the issue forthrightly someday, and Cleveland seems as good a place as any.

As I have said, I will gingerly concur with the result here because the Commission's more recent decisions (*e.g., Evening Star, Anax, supra*) appear to be trending towards a dispositive focus on *voting* control. Still, it would seem unfair to present this case without admitting that cross-strains of our cross-ownership and cross-interest policies are creating ambiguities in the comparative process, and anomalies such as this case as well. It could be that the Commission might wish to address this matter, *sua sponte*, it being unlikely, of course, that any party will be "insufficiently satisfied with the Board's view.

*Separate Statement of Board Chairman Marino*

While joining fully in the Board's Decision, one procedural aspect of this case is troublesome to me. Very late in the comparative process, Cleveland Television invoked the "cross-interest" policy in an effort to disqualify its competitor, Channel 19.

In 1968 the Commission argued in *Radio Athens, Inc., (WATH)* v. *F.C.C.*, 401 F.2d 398, 402 (D.C. Cir. 1968), that Commission case law had evolved to the point that a broadcast applicant should have been on notice that the Commission prohibited not only cross ownership, operation or control but also any cross interests. Judge Leventhal disagreed, concluding that administrative due process required clearer notice. The cross ownership rules were subsequently amended several times and yet the cross interest policy was not codified in the rules. On the contrary, as both the Board Decision and the Statement "Concurring Dubitante" recognize, Commission law is evolving in the opposite direction and "voting control" is now the crucial test.

In today's case a cross interest issue was not designated in the Hearing Order nor was the issue raised at the hearing by Cleveland Television. Counsel for Cleveland Television candidly conceded at oral argument that the issue was not even directly briefed in exceptions, instead it was buried in a cryptic footnote. Under these circumstances, administrative due process especially in the litigious comparative context would seem to dictate that, if the "cross-interest policy" is found to still have any vitality left and is extended to the Malrite interest, Channel 19 should not be disqualified. Rather it should be permitted to amend its application to eliminate the cross interest as the Commission has permitted in other ancient cross interest cases. Such an amendment would not change the outcome of the Board's comparative decision; but outright disqualification of the applicant might well violate the notice requirement set out in the 1968 *Radio Athens* case and recently reaffirmed in *RKO General, Inc.* v. *F.C.C.*, 670 F.2d 215 (D.C. Cir. 1981), *cert. denied*, 102 S. Ct. 1974 (1982).

FCC 82D–25

**BEFORE THE**

# FEDERAL COMMUNICATIONS COMMISSION

**WASHINGTON, D.C. 20554**

| | |
|---|---|
| In re Applications of | |
| CLEVELAND TELEVISION CORPORATION<br>Cleveland, Ohio | BC Docket<br>No. 80–425<br>File No.<br>BPCT–5149 |
| CHANNEL 19, INC.<br>Shaker Heights, Ohio | BC Docket<br>No. 80–426<br>File No.<br>BPCT–5242 |
| For a Construction Permit for a New Commercial Television Station | |

*Appearances*

*Robert J. Rawson, Vincent J. Curtis, Jr.* and *David N. Sternlicht,* on behalf of Cleveland Television Corporation; *Samuel Miller, Ben C. Fisher, Clifford M. Harrington, David D. Oxenford, Bruce A. Eisen* and *Jason L. Shrinsky,* on behalf of Channel 19, Inc.; and *Arthur I. Steinberg,* on behalf of the Broadcast Bureau, Federal Communications Commission.

*INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN H. CONLIN*

ISSUED APRIL 5, 1982; RELEASED APRIL 12, 1982

*Preliminary Statement*

1. In an order released on August 5, 1980, the applications of Cleveland Television Corporation (CTC) and Channel 19, Inc. (Channel 19) were designated for hearing. The following issues were specified:

1. To determine with respect to Channel 19 the extent of common ownership, operation and control between stations WHK and WMMS(FM) and the proposed television station, and whether said ownership would be in the public interest.
2. To determine the areas and populations which would receive primary television service (Grade B or better) from CTC and Channel 19, and other primary television service to such areas and populations.

3. To determine, in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.
4. To determine, in the event it is concluded that a choice between the applications should not be based on considerations relating to Section 307(b) of the Act, which of the proposals would, on a comparative basis, best serve the public interest.
5. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

2. Prehearing conferences were held on October 15 and November 4, 1980. The hearing took place on December 8–10, 1980. Proposed findings of fact and conclusions of law were filed by both applicants and the Broadcast Bureau on March 16, 1981; and replies thereto were submitted by all parties on April 1.

3. In the meantime, the presiding officer issued a Memorandum Opinion and Order (FCC 81M–917, released March 31, 1981) granting a petition to enlarge issues filed by CTC and specifying the following issue for hearing:

To determine whether Metroplex Communications of Tampa Bay, Inc. violated the Commission's policies prohibiting false and deceptive representations regarding a station's audience size or ratings and, if so, the effect thereof on the basic and/or comparative qualifications of Channel 19, Inc. to become a Commission licensee.

Hearing conferences were held on March 19 and April 16, 1981; and the hearing on the additional issue took place on May 26. Findings and conclusions were filed by all parties on August 10 and 12 and replies thereto on August 28. Thereafter, on September 24, 1981 a supplement to proposed findings was submitted by Channel 19 and on October 7 the other parties replied.[1]

## *Findings of Fact*

### *The Applicants*.

4. *CTC*. CTC is a corporate entity with the following structure:

| *Name* | *Stock Interest* | *Office* | *Director* |
|---|---|---|---|
| Aben E. Johnson, Jr. | 20% | President | Yes |
| Donald S. Johnson | 10% | — | — |
| Douglas R. Johnson | 10% | Vice President | — |
| Susan M. Johnson | 10% | — | — |
| Aben M. Johnson[2] | 10% | — | — |
| Augustus L. Harper | 10% | Treasurer | Yes |
| Clifford Beresh | 10% | Secretary | Yes |
| Charles E. Allen | 10% | — | — |
| James M. McCombs | 5% | — | — |
| William K. Wolfe | 5% | — | — |

[1] Though not provided for by the rules, these pleadings, which are in effect memoranda of law addressing a recent Commission ruling, have been considered.

[2] Donald S. Johnson, Douglas R. Johnson and Aben M. Johnson are the sons of Aben E. Johnson, Jr. Susan M. Johnson is his daughter.

5. *Channel 19.* The officers and directors of Channel 19 are as follows:

| | |
|---|---|
| Hubert B. Payne | President and Director |
| Norman Wain | Vice President and Director |
| Robert C. Weiss | Treasurer and Director |
| William A. Derrick, Jr. | Secretary and Director |
| Nina S. Wain | Assistant Vice President |

The Articles of Incorporation authorize issuance of 400 shares of common stock and 200 shares of preferred (nonvoting) stock. There are 200 shares of common stock presently outstanding. The stock is distributed as follows:

| | |
|---|---|
| Metroplex Communications | 100 shares |
| Diamond Broadcasting, Inc. | 100 shares |

Metroplex is a partnership comprised of Norman Wain and Robert Weiss, each of whom holds a one-half interest. Diamond is an Ohio corporation with the following structure:

| | |
|---|---|
| Hubert Payne | President and Director (votes Diamond's stock in Channel 19) |
| William Derrick | Secretary and Director |
| Overlook TV Group, Inc. | 100% stockholder[3] |

6. There are 100 shares of nonvoting preferred stock of Channel 19 outstanding. These are held by the following: Milton Maltz (67 shares); Carl E. Hirsch (30 shares); and John R. Wilson (3 shares).

*Issue 1—Cross Ownership.*

7. This issue seeks to determine the extent of common ownership, operation and control between Channel 19's proposed station and stations WHK and WMMS-FM. The latter stations, licensed to Cleveland, are owned by Malrite of Ohio, Inc. Both the city grade and Grade A contours of Channel 19's planned facility will completely encompass the city limits of Cleveland.

8. Virtually all of Malrite's stock is owned by Milton Maltz, with fractional interests being held by Carl E. Hirsch and John R. Wilson, who in addition are officers and directors of the corporation. Maltz, Hirsch and

---

[3] The largest stockholder (90%) in Overlook TV Group, Inc. is Overlook Communications Systems, Inc. Payne owns more than 83% of its stock and is an officer and director; Derrick is an officer, director and 4.7% stockholder.

Wilson have subscribed, respectively, to 67, 30 and 3 shares of preferred stock in Channel 19 at $2,162.50 per share. Thus, Maltz will pay $144,887.50 for his stock, Hirsch $64,875 and Wilson $6,487.50, a total sum of $216,250. This 100 shares represents all of the preferred stock and one-third of the total stock of the corporation presently outstanding; similarly the $216,250 purchase price represents one-third of the total capital to be contributed to Channel 19 (Channel 19 Ex. 2; Tr. 251–252).

9. As previously described (para. 5, *supra*), Channel 19's common stock (200 shares) is held by Metroplex Communications and Diamond Broadcasting, Inc., each owning 100 shares. Metroplex is owned in equal parts by Norman Wain and Robert Weiss; Diamond's stock will be voted by Hubert Payne, the majority stockholder (83%) in a parent corporation. Channel 19's board of directors is comprised of Wain, Weiss, Payne and William A. Derrick, an associate of Payne's, who holds a small derivative ownership interest in the corporation. All will serve as well as officers of Channel 19.[4]

10. Originally the Malrite shareholders were to own common stock. It was believed that, as experienced and respected broadcasters who were familiar with the Cleveland market, they brought considerable strength to the organization (Tr. 254–255). When the group realized that this proposal would run afoul of the Commission's multiple ownership rules (i.e., Section 73.636(a)(1), note 8), a determination was made, based on a suggestion by Maltz, that the Malrite principals' ownership interests should be in the form of preferred stock. The application was amended to reflect this change. See *Hearing Designation Order*, para. 3.

11. The amendment allows Channel 19 to continue its reliance on Malrite as a source of funds and to maintain its association with the Malrite principals. However, it is the intention of the group to reduce the role of Messrs. Maltz, Wilson and Hirsch to that of investors only, insulating them from responsibility for or operation of the station (Channel 19 Ex. 1, p. 8). Earlier plans for services to be rendered by them were eliminated, and the common stockholders recognize no obligation to accept advice or recommendations from them (*id.*).

12. Pursuant to this arrangement the Articles of Incorporation were amended to provide for a new class of nonpreferred stock. Maltz, Wilson and Hirsch cancelled their subscriptions for common stock and instead subscribed to the preferred stock. Originally Maltz was to be a director of Channel 19 and Wilson an officer. As the applicant is presently constituted, they will hold neither position.

13. The preferred stock carries with it no voting rights except as specifically required by Ohio law. This exception permits preferred stock-

---

[4] Wain and Weiss had previously been associated with Payne and Derrick in an unsuccessful effort to acquire broadcast properties.

holders to vote on changes to the Articles of Incorporation that would affect the preferred shares (Channel 19 Ex. 6, App. B). Preferred shareholders may vote on amendments that assign or alter the par value of preferred stock; alter the number or class of shares of preferred stock; alter the express terms of preferred stock or of any class of stock subsidiary to preferred stock in a manner substantially prejudicial to the holders thereof; authorize conversion of another class of stock into preferred stock; reduce the stated capital of the corporation; change the purposes of the corporation; or change the corporation into a nonprofit corporation (*id.*). In the situations in which preferred shareholders can vote, they vote as a class. In the specified situations in which they can vote, a two-thirds vote of the outstanding preferred shares is needed to pass an action. These actions must also be approved by a two-thirds vote of the outstanding common stock (*id.*).

14. The preferred stock is entitled to a $1.00 per share dividend prior to any distribution to the common stockholders. This dividend is noncumulative. Thereafter, the preferred stock shares ratably with the common in all dividends. Preferred stock is convertible into common only after five years from the date of issuance and only if (1) the conversion does not violate the provisions of any federal statute administered by the FCC or any valid rule promulgated thereunder; and (2) the stock is either (a) beneficially owned by Milton Maltz, Carl E. Hirsch or John R. Wilson, or (b) the majority vote of the common stock then outstanding has approved of the conversion (Channel 19 Ex. 4, pp. 4–5).

15. Preferred stock cannot be sold without the prior written consent of the corporation. In order to sell his preferred stock, a shareholder must identify the buyer and the terms of the sale. The corporation has the right to purchase at the same terms and can assign its right to a holder of common stock. Only if these options are not exercised may the stock be sold. The preferred shareholders have certain rights to purchase additional shares of preferred stock, including the right of first refusal to purchase a certain percentage of the shares of a common stockholder proposing to sell such shares.[5] Holders of both common and preferred stock are entitled to share on a pro rata basis in the proceeds of any sale, dissolution or liquidation of Channel 19.

16. In addition to the ownership interest described above, Milton Maltz has agreed to become one of the guarantors of a $216,670 bank loan to Diamond. Malrite has also offered to lease to the applicant several pieces of studio equipment. There is no evidence, however, that any of the Malrite principals have been actively involved in corporate affairs since the decision was made to put their interests in the form of preferred stock.

---

[5] In this event, the preferred stockholder would receive shares of preferred stock.

*Issue 2—Areas and Populations to be Served.*

17. The Hearing Designation Order notes that while the applications are for different communities, they propose to serve substantial areas in common. In fact the service areas are identical. The applicants have selected the same antenna site, located south of Cleveland in the community of North Royalton, and would operate at the same height and power. They have stipulated that there would be no difference in their city grade, Grade A and Grade B contours.

*Issue 3—Section 307(b) Considerations.*

18. Since the applicants propose different cities of license, Cleveland and Shaker Heights, an issue was specified to determine which proposal would better provide a fair, efficient and equitable distribution of service. The evidence adduced under this issue is directed largely to establishing the characteristics of the community of Shaker Heights.

19. Shaker Heights is located about 8 miles from the shores of Lake Erie in Cuyahoga County. The city encompasses some 6.3 square miles in area and is contiguous to Cleveland. The 1970 U.S. Census showed a total population of 36,309 persons. The population was 14.4% black, 85.3% white and .37% other races. The median family income of Shaker Heights was $19,928, thus ranking it the sixth highest income municipality in the United States.

20. The 1970 work force consisted of 15,029 persons 16 and over. Males constituted 64.9% of the work force, females 35.1%. The industries in which the labor force was employed were categorized in the 1970 Census as follows:

| | |
|---|---|
| Manufacturing | 17.0% |
| Wholesale & Retail Trade | 22.5% |
| Services | 8.9% |
| Educational Services | 9.7% |
| Construction | 2.3% |

More than half the labor force was employed in professional and managerial capacities, and some 28.6% hold sales and clerical white collar jobs.

21. Shaker Heights is an independent municipality organized under the laws of Ohio. It has full home rule under the Ohio constitution. The city is governed by a mayor and seven member city council. The city has an architectural board of review, a city planning commission and a board of zoning appeals. Other government offices include: clerk of council, tax clerk, city planner, building commissioner, commercial area coordinator, directors of finance, law, health and public service and purchasing agent. An officer for senior adults also operates in the city.

22. The city operates its own police and fire departments. Emergency para-medical teams are on round-the-clock call at the city's fire stations.

The fire department and rescue squads spent $1,965,687 in 1979 and had a staff of 74. The police department employs 70 persons and had 1979 expenditures of $2,610,008. The city also has a municipal court. The city provides water and sewer services to its residents and also operates a rapid transit system and a public library system.

23. The Shaker Heights school district has a five-member board of education. The system operates 12 schools with total enrollment of approximately 6,100 students. The schools have a teaching staff of 423. Specialists including psychologists, social workers, speech therapists, reading and math specialists and a clinical psychiatrist are also employed. The system had a 1978 budget of approximately $18,000,000. There are also a number of private schools in the city.

24. The city has a recreation board consisting of nine members. Day-to-day administration of city recreation facilities is the responsibility of the director of recreation and adult education. The board operates a public park, an adult education program and programs for youth, senior citizens and the mentally handicapped. Private organizations also provide recreational services, including the Shaker Heights Country Club and Shaker Lakes Regional Nature Center. The latter is a nonprofit organization utilizing the 278-acre Shaker Lakes Park as an outdoor classroom for environmental programs for all ages. The Shaker Historical Museum is also in the city. It is organized to preserve the culture of the early Shaker settlers of Shaker Heights and is supported by memberships to the Shaker Historical Society.

25. There are at least 10 churches and temples located in Shaker Heights and about 24 active civic and fraternal organizations.

26. There are no AM, FM or television broadcast facilties licensed to Shaker Heights. Channel 19 proposes to locate its station there.

27. Cleveland is an incorporated city located, like Shaker Heights, in Cuyahoga County. According to the 1970 United States Census, the population of Cleveland was 751,000, of whom approximately 287,800 (38%) are black. The 1970 labor force was 303,146 persons. The industries in which the labor force was employed were categorized in the 1970 Census as follows:

| | |
|---|---|
| Manufacturing | 37.5% |
| Wholesale & Retail Trade | 17.3% |
| Services | 8.4% |
| Educational Services | 5.0% |
| Construction | 3.8% |

Government employees comprised about 14% of the labor force, 12.7% were employed in professional and managerial positions, 23.9% in sales and clerical positions, and 14% as craftsmen and foremen. The median family income in 1970 was about $9,000.

28. There are 3 VHF and 2 UHF television stations licensed to Cleveland as well as 7 AM and 14 FM radio stations.

*Issue 4—Comparative Issue.*[6]

29. *CTC.* Aben E. Johnson, Jr., CTC's president, a member of its board of directors and a 20% shareholder, plans to devote 20 hours per week to the proposed station. It is contemplated that he will aid in the employment and training of the staff, supervise other officers and management personnel and help in program development. He will hold ultimate responsibility for the operation of the station.

30. Johnson is now president and general manager of WXON-TV, Detroit, Michigan, a station in which he has a 56.9% ownership interest. WXON-TV began broadcasting in 1968 and has been operated by Johnson since that time, first on Channel 62 and presently on Channel 20. He is a resident of Bloomfield Hills, Michigan and intends to continue living there, while perhaps establishing a second residence in Cleveland (Tr. 195). He will share operational duties at WXON-TV with co-owner John E. Daneher, permitting him, according to his testimony, to devote on the average about 20 hours weekly to the proposed Cleveland station.[7]

31. Johnson's son, Aben M. Johnson, will serve as chief engineer and program and operations manager, devoting at least 40 hours per week to these functions. A 10% stock subscriber in CTC, he intends to move to Cleveland from his present home in Michigan. His previous broadcast experience includes employment as an engineer at station WXON-TV, Detroit, from 1973 through 1979. In that capacity, he was responsible for the creation and execution of on-air commercial and public service promotion, was senior master control operator and consultant on broadcast operations and assumed the duties of the operations manager in the

---

[6] This discussion focuses on the background and experience of principals who will be integrated into the operation of the proposed stations and on the media interests attributable to the applicants. A description of the corporate structure of each applicant (shareholders, officers, directors, etc.) is set forth at paras. 4–6, *supra.*

[7] On cross-examination the following exchange occurred (Tr. 196):

> Q All right, and so you are going to move to Cleveland for a period of years?
>
> A I will be spending a good deal of my time there, 20 or more hours a week, for a period of years, yes.
>
> Q In other words, every single week you will spend at least half of that week in Cleveland for several years.
>
> A I can't go that far. I don't, it depends on the needs at that time whether I would spend all of one week and perhaps not be there for one week. That I am not sure of.
>
> Q In other words, you just have not yet—
>
> A I could not say that I, every single week I would be there. I would certainly be available when I wasn't there, as far as information or guidance.

absence of the permanent manager. During the time he was employed at WXON-TV, Johnson obtained an FCC First Class Radiotelephone License. Since February 1979, he has been employed as an engineer/editor by the General Television Network, a video tape production facility located in Oak Park, Michigan.

32. Augustus L. Harper, CTC's treasurer and a 10% stock subscriber, will be "actively involved in the daily operation" of CTC, though the amount of time he will devote to the station's affairs is unspecified. Harper is a black, a lifelong resident of the Cleveland area, a certified public accountant and an associate professor of business administration at Baldwin-Wallace College. He is secretary of the National Association of Black Accountants and a member of the board of the Urban League of Greater Cleveland.

33. James M. McCombs, a 5% stock subscriber, is the proposed general manager of CTC's station. As general manager, McCombs will oversee all aspects of the station's operation, reporting directly to the president and the board of directors. McCombs expects to devote at least 40 hours per week to his duties at the station. A black man and a resident of Shaker Heights, McCombs has had extensive broadcast experience in the Cleveland area and elsewhere. From 1967 to 1970 he was an account executive with radio station KYAC, Seattle, Washington. From 1972–1973, he was an account executive with station WABQ, Cleveland, Ohio. Since that time he has been employed as an account executive with station WJMO in Cleveland.[8]

34. As stated earlier, Aben E. Johnson, CTC's president and 20% stock subscriber, owns 56.9% of the stock of WXON-TV, Inc., the licensee of WXON-TV, a UHF station in Detroit, Michigan. Except for this interest no CTC stock subscriber owns any interest in any other medium of mass communications, though Douglas Johnson is an officer and director of WXON-TV, Inc. (Tr. 47–48) and Clifford Beresh is employed as sales manager at that station.

35. *Channel 19.* Four persons with ownership interests in Channel 19 will be involved in the operation of the proposed station. Hubert Payne, who votes the stock of Diamond Broadcasting, Inc. in Channel 19 (50% of the applicant's common stock) and is president and director of the applicant,[9] will be general manager of the proposed station, devoting more than 40 hours per week to this position. William A. Derrick, Jr., who also has an ownership interest in the applicant through Diamond Broadcasting, Inc. and who serves as both a director and secretary of Channel 19, is

---

[8] In addition to Harper and McCombs, two other CTC stock subscribers are black, Charles Allen (10%) and William K. Wolfe (5%), bringing CTC's total minority ownership to 30%. There is no evidence that either Allen or Wolfe will be active in station affairs.

[9] See para. 6, *supra*.

the proposed public affairs director. As public affairs director, he will spend at least 20 hours per week on the station's activities.

36. Robert C. Weiss is a 50% general partner in Metroplex Communications, a partnership which owns 50% of Channel 19's voting common stock. Weiss is proposed director of sales for the new station. In that capacity, he will spend at least 20 hours per week. Norman Wain, also a 50% general partner in Metroplex, is to be promotion director for the proposed station. In that capacity, he will devote at least 20 hours per week to station operations.

37. As general manger Hubert Payne will be responsible for all phases of the station's operation. Payne is a black who has lived in the Cleveland area since 1946. He is currently employed as regional sales manager for WKYC-TV, Cleveland, where he supervises a staff of six sales persons. Previously he was an account executive and a sales manager, both at WKYC-TV. In all he has more than 11 years of broadcast experience in Cleveland. He has been a member of the board of the Cleveland Civic Orchestra and belongs to the Cleveland Advertising Club, the Cleveland Association of Broadcasters and the NAACP.

38. William Derrick is a lawyer and business associate of Hubert Payne. He has lived in the Cleveland area since 1970 and presently resides in Shaker Heights. He too is black. Derrick is a member of the board of trustees of the Educational Television Association of Metropolitan Cleveland, the licensee of noncommercial station WVIZ-TV, and is a committee member of the Tax Section of the American Bar Association.

39. Robert C. Weiss, the proposed director of sales for the station, serves as treasurer and director of Channel 19. He has been a resident of the Cleveland area for 25 years. Weiss is a member of the Cleveland Advertising Club and of the Cleveland Athletic Club. Weiss has been involved in broadcasting since 1956 when he was a time salesman for WHK in Cleveland. He held this position until 1964. Along with Norman Wain and others, he organized a corporation to purchase WFAS AM/FM in White Plains, New York. These stations were acquired in 1964. Stations WIXY and WDOK (FM) in Cleveland were purchased in 1965 and operated by Weiss and associates until 1971. WIXZ, McKeesport, Pennsylvania was acquired by a partnership in which Weiss had a one-third interest. The station was held from 1967 to 1973. From 1976 to 1980, Weiss was an officer, director and shareholder in Metroplex Communications of Texas, Inc., licensee of KOAX(FM) in Dallas. He is also a substantial partner in an organization which, through corporate subsidiaries, presently owns and operates broadcast stations in various parts of the country (see para. 41, *infra*).

40. Norman Wain, the proposed promotion director for the new station, serves as vice president and a director of Channel 19. Wain has been in the Cleveland area since 1954 when he became an announcer at a local radio

station. He presently resides in Shaker Heights, Ohio. Wain has participated in a number of local civic activities and organizations, including: Cleveland Ballet, Cleveland Convention and Visitors Bureau, Jewish Community Federation, Bellefaire Children's Home in Cleveland, and Jewish Family Service Association. Wain has been in broadcasting since 1949 when he started as a radio announcer at WLOW in Norfolk, Virginia. He moved to Cleveland in 1954 to become an announcer at WDOK, where he worked until 1958. From 1959 to 1961 he was radio and TV director for the WYSE Advertising Agency in Cleveland, and thereafter ran his own advertising agency, "Norman Wain Associates," from 1961 to 1962. From 1962 to 1964, he was a salesman at WHK in Cleveland. His first broadcast ownership interest came when he and others acquired WFAS AM/FM in 1964 and WIXY and WDOK in 1965 (see para. 39, *supra*). Since that time, Wain has held ownership interests in WIXZ, McKeesport, Pennsylvania and KOAX(FM), Dallas, Texas.

41. As for their present broadcast holdings, Wain and Weiss are general partners in Metcom Associates, an Ohio limited partnership, each having a 48 1/2% interest. Each of their wives holds a one-half of one percent equity interest as limited partners. Metcom Associates owns all the stock of Metroplex of Missouri, Inc., licensee of KEZK(FM), St. Louis, Missouri; Metroplex of Tampa Bay, Inc., licensee of WCKX(FM), Clearwater, Florida; and Metroplex of Florida, Inc., licensee of WHYI-FM, Fort Lauderdale, Florida and WHTT, Miami, Florida. Wain and Weiss are officers and directors of each licensee company. In addition each owns 46.875% of the stock of Metroplex Communications of Virginia, Inc. and are officers and directors. Metroplex Communications of Virginia, Inc. is the sole general partner of Metcom Virginia Associates, an Ohio limited partnership, licensee of WVKX(FM), Woodbridge, Virginia and WPKX, Alexandria, Virginia (Channel 19 Ex. 13).[10]

42. *Promotional Practices at WCKX*. Based on allegations that a radio station owned by Channel 19 shareholders Wain and Weiss had engaged in deceptive promotional practices, an inquiry into the matter was ordered by the presiding officer (FCC 81M–917, released March 31, 1981). Since it seems clear that the evidence adduced under this issue would not warrant

---

[10] As previously discussed (paras.7–8), Channel 19's preferred stockholders, Milton Maltz, Carl Hirsch and John Wilson, own the licensee of WHK and WMMS-FM, Cleveland. In addition these three men have other broadcast interests outside the Cleveland area. They are stockholders, officers and directors of Malrite Broadcasting Co. which, through subsidiaries, is licensee of the following stations: KEEY AM/FM, St. Paul, Minnesota; WZUU AM/FM, Milwaukee, Wisconsin; WNYR(AM) and WEZO(FM), Rochester, New York; and WCTI-TV, New Bern, North Carolina. Fifty one percent of the permittee of WAWS-TV, Jacksonville, Florida is also owned by this company, as is all of the nonvoting stock in Crown Broadcasting Corporation. Maltz, Hirsch and Wilson also are officers, directors and stockholders in the licensees of WUHF(TV) in Rochester, New York and of WFLX(TV) in West Palm Beach, Florida (CTC Ex. 12).

disqualification of Channel 19, the matter is being considered as part of the comparative issue.

43. In September 1980 Metroplex of Tampa Bay, Inc., owned by Wain and Weiss, acquired WCKX, an FM station licensed to Clearwater, Florida. Shortly thereafter a promotional campaign was launched describing WCKX as "Tampa Bay's New #1 FM." Audience surveys did not recognize WCKX as the top rated station in the market. However, according to Weiss, the slogan was selected because some public participants in a marketing research project conducted by Metroplex used the phrase "number one station" in speaking of their own favorite station (Tr. 360–361, 431–432).

44. Billboards began appearing in late September reading "96 KX—Tampa Bay's New #1 FM" (CTC Ex. 19). The words "Tampa Bay's" and "FM" were in dark blue and the phrase "New #1" was in bright orange. According to Weiss the orange coloring was used to suggest that WCKX "was going to be future number one station for listeners" (Tr. 365). In all, 16 billboards were erected. In addition the phrase was used on business cards and certain promotional material and was also employed in on-the-air promotional announcements.

45. Almost immediately the campaign came to the attention of a competitor, Ed Winton, whose own station, WWBA-FM, was then the highest rated FM facility in the market. He complained to Metroplex that the advertising presented an unfounded claim as to audience size. Weiss attempted to explain that no such claim was intended, but Winton insisted that the campaign be stopped (Tr. 370–375). After consultations between Weiss, Wain and their Washington counsel, it was agreed that the promotion wuld be terminated and a new slogan devised. Weis continued to believe that the campaign was ligitimate but stated that, as a new station owner in the area, he did not wish to antagonize a competitor (Tr. 377). Promotional announcements were immediately discontinued, and by the end of October billboards had been repainted, business cards reprinted and newspaper advertising copy revised to eliminate the claim that WCKX was "#1."

46. In late 1980 the October/November 1980 ARbitron Radio ratings report for the Tampa-St. Petersburg market was released. At page 42 of that report the "Average Quarter-Hour and Cume Listening Estimates" are given for the Monday-Sunday, 6:00 a.m.–midnight period. Listed under columns headed "Adults 18–34," "Metro Survey Area," and "Avg. Pers Shr.," is the figure "13.4" for station WCKX (Channel 19 Ex. 20, p. 42). This is the largest figure in the column, indicating that during the period covered by the survey WCKX was the number one station in the 18–34 age group, from 6:00 a.m. to midnight, Monday through Sunday, in the Tampa-St. Petersburg market.

47. From the end of 1980, when the Arbitron ratings were released, until May 12, 1981, WCKX broadcast an announcement in which it identified itself as "Metro Tampa's #1 contemporary music station, 96 KX." These announcements were broadcast once an hour, on the half hour. In addition, at the end of 1980, approximately every three or four hours for about one week, WCKX broadcast the following recorded announcement (Stipulation 7, p. 4):

> 96KX takes this moment to say thank you. Thank you for making this past year the best of our lives. We intend to make 1981 the best of your life, and here's why:
>
> According to advance rating figures we've received from Arbitron, as of the Fall of 1980, 96KX has become the new number one contemporary music station in the Tampa/St. Petersburg metro listening area. You've made us the most listened to contemporary music station in town.
>
> Seven days a week, 6 A.M. to Midnight, with everyone 12 and over based on share of audience. And this happened within only weeks of our becoming 96KX. How can we say thank you?[11]

## *Conclusions*

*Issue 1—Cross Ownership.*

1. In addition to 200 shares of common stock, Channel 19 has issued 100 shares of nonvoting preferred stock. It is held by Milton Maltz, Carl E. Hirsch and John R. Wilson, who in return will provide one-third of the total capital to be contributed to Channel 19. None is an officer or director of the corporation. Maltz, Hirsch and Wilson own virtually all of the stock of Malrite of Ohio, Inc., which is the licensee of stations WHK and WMMS-TV in Cleveland. Both the city grade and Grade A service contours of Channel 19's proposed television station would completely encompass the city of Cleveland.

2. Section 73.636(a)(1) of the rules provides that a license for a VHF television station will not be granted to an applicant with principals who own, operate or control an AM or FM station licensed to the same community in which the proposed television station would be located. This prohibition, however, does not apply to UHF applications; instead the rule provides (Note 8) that such applications "will be handled on a case-by-case basis in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest." CTC and the Bureau contend that no such showing has been made. Channel 19 argues that Section 73.636(a)(1) and Note 8 thereto are not applicable to this case.

---

[11] A more sweeping assertion of WCKX's #1 status appeared in the February 1981 issue of a local publication called the *Rainbow Times*. The evidence shows, however, that the person primarily responsible was the publisher of the paper and that a Metroplex exployee had attempted to have a disclaimer included that would have qualified the statement (Stipulation 6).

3. In applying its multiple ownership rules and policies to corporate entities, the Commission has defined meaningful or cognizable ownership in terms of voting interests. See *Section 73.636, Notes 2–7; Amendment of the Commission's Rules Relating to Multiple Ownership,* 68 F.C.C. 2d 1302, 1305 (1978); *Evening Star Broadcasting Company,* 67 F.C.C. 2d 318 (1978). Thus, in the latter case the Commission concluded that "based upon a review of the rules and precedents, ownership of preferred stock will not invoke the strictures of the multiple ownership rules absent contingent control rights" (*id.* at 324).

4. Here no such contingent rights are evident. The preferred stock is nonvoting except in certain narrow areas where the right of preferred stockholders to vote is required under Ohio law. None of these instances involve matters which would have an impact on the operation of the proposed station. While the preferred stock may under certain conditions be converted to common stock, one of the conditions is that any conversion must be consistent with FCC regulations. Similarly, although preferred stock may be sold, the corporation or its common stockholders have the right to purchase it before it can be transferred to an outsider. Moreover, in the event preferred stock is sold it may not be converted into voting shares unless the conversion is approved by a majority of the voting shareholders. Thus there is no likelihood that the preferred shareholders would acquire any leverage over the voting shareholders such as might occur if the right to sell were unrestricted.[12] Finally, none of the preferred stockholders is an officer or director of the corporation.

5. It can perhaps be argued that the substantial investment represented by the preferred stock in this case provides its owners with the potential for influence on corporate management. This general subject is discussed in the notice of inquiry and proposed rulemaking referred to above (see 68 F.C.C. 2d at 1305–1306). Though stating that it has the "flexibility to examine preferred or other stock holdings" in applying the multiple ownership rules, the Commission indicated that presently its general policy is not to do so. In the circumstances, the presiding officer concludes that since the ownership interest of Maltz, Hirsch and Wilson is in the form of preferred stock which contains no rights affecting control of the proposed station, it is not an interest sufficient to warrant the disqualification of Channel 19. *Amendment to the Commission's Rules Relating to Multiple Ownership, supra; Evening Star Broadcasting Company, supra.* It will, however, be given appropriate consideration in the context of the comparative issue.

---

[12] *Cf. Evening Star Broadcasting Company, supra,* at 323.

*Issues 2 and 3—Section 307(b) Considerations.*

6. Issue 2 seeks to ascertain the areas and populations the applicants propose to serve. Both CTC and Channel 19 propose to locate their antennas on the same tower and operate at the same height with the same power. There would be no difference, therefore, in the coverage of their respective city grade, Grade A or Grade B contours. Consequently, it is concluded that neither applicant is entitled to an advantage based upon the areas and populations proposed to be served.

7. Issue 3 requires a determination as to which of the applicants would provide the more fair, efficient and equitable distribution of service. The issue arises because CTC proposes Cleveland as its city of license and Channel 19 proposes Shaker Heights. The Commission's table of assignments (Section 73.606) allocates the channel to Cleveland, but pursuant to Section 73.607(b) it is "available" for use in any locality within 15 miles of Cleveland. Ordinarily, the evaluation called for under Section 307(b) of the Communications Act involves a comparison of the need for a new reception service in the areas the respective applicants would serve and the need of the communities specified in the application for a new transmission service. *Kent-Ravenna Broadcasting Co.*, 22 RR 605 (1961). Here, reception service offers no basis of comparison since the applicants will serve identical areas and populations. With respect to the relative needs of Shaker Heights and Cleveland for a new transmission outlet, a threshold question exists as to whether they should be considered as separate communities for allocation purposes.

8. Shaker Heights is contiguous to Cleveland and both are located in Cuyahoga County. Shaker Heights is about one-twentieth the size of Cleveland and is plainly a suburb of the larger central city. On the other hand it is a separate municipality with its own governmental structures, a number of civic and fraternal organizations and some recreational and cultural amenities. It is also more affluent than Cleveland and its minority population is relatively much smaller. Shaker Heights has no local television station (or broadcast station of any kind) whereas Cleveland has five TV stations (four commercial and one noncommercial).[13]

9. Channel 19 contends that since Shaker Heights is a municipality with an identity of its own and has no local transmission service, Section 307(b) considerations require a grant of its application. However, it is well-settled that in construing Section 307(b), the term "communities" is not synonymous with "municipalities." The type of facility sought, the proposed service area and the importance of the municipality in relation to nearby cities and towns are among other factors considered. *St. Louis Telecast, Inc.*, 22 F.C.C. 625, 712 (1957). In cases involving mutually exclusive applications for a principal city and a contiguous suburb it has

[13] Cleveland has numerous AM and FM facilities as well.

been held that where both applicants propose to serve substantially the same areas and populations, Section 307(b) considerations are not applicable since the need for a local station should not be permitted to "outweigh the obvious fact" that the proposed station would also serve, and indeed is required to serve, the needs of the entire area. *Huntington Broadcasting Co.*, 14 F.C.C. 563, 584 (1950). In affirming the Commission's decision in that case, the Court of Appeals stated:

> [T]he Commission determined—correctly, we think—that the choice was not as to which of two communities showed the greater need for a new station, but was rather which of two applicants would better serve the one large community which both desired to cover. *Huntington Broadcasting Co.* v. *F.C.C.*, 192 F.2d 33, 35 (D.C. Cir. 1951).

See also *Massillon Broadcasting Co., Inc.*, 36 F.C.C. 809, 811–813 (1964) and the cases cited therein.[14]

10. This approach is particularly appropriate in considering applications for television facilities. Unlike aural facilities where classes of stations have been established to serve local, regional or wide areas,[15] the television allocation scheme recognizes only one class of stations.[16] A table of assignments was devised assigning channels to various cities on the basis of Section 307(b) considerations. As Channel 19 contends, one of the goals (though not the primary one) was to provide every "community" with at least one television station (*Sixth Report and Order, supra*, at 167) and the Commission noted that the allocations table had "gone far" in that direction (*id.* at 168), assigning at least one station to more than 1,250 cities. Of necessity, however, a balance was struck which reflected the equitable claims of large population centers to additional assignments. In general four to six assignments were made to central cities with populations of between 250,000 and 1,000,000 (*id.* at 169). In the case of Cleveland five channels were originally proposed, but on the basis of comments filed in the proceeding, it was decided that an additional assignment was warranted in view of the city's large population. It is clear, therefore, that the channel for which a license is sought in this proceeding was designed

---

[14] In *Massillon* the Commission stated that (*id.* at 812):

> . . . in deciding whether a proposal is for a suburban or principal city, the problem is not only whether a community with which a proposal is identified is commercially, geographically, and culturally independent from another city, but also whether in view of the proposals involved—with particular concern for their frequency, power, and coverage—the needs of the community proposed to be served are to be considered apart from those of its nearby principal city or the urbanized area as a whole. In other words, is the particular proposal realistically one to serve the smaller suburb or one to serve the metropolitan complex? (Footnote omitted.)

[15] See 73.21; 73.206.

[16] At one time consideration was given to establishing three classes of stations, "community, metropolitan and rural," but it was decided that only a single class was needed. *Sixth Report and Order on Television Assignments*, 41 F.C.C. 148, 189–190 (1952).

primarily to serve Cleveland and its environs, and in reality this is what both applicants propose to do.[17]

11. In sum, although Shaker Heights is a distinct municipality without a local broadcast station, the facts of this case as well as the underlying television allocation concepts referred to above do not warrant a preference, determinative or otherwise, for Channel 19's proposal to locate there.[18] The proximity of the two cities, their relative size and the fact that both propose to serve identical areas and populations require that a choice be made not on the respective needs of the two communities for the station but on the comparative qualifications of the applicants to serve the one larger community both desire to cover.

*Issue 4—Comparative Issue.*

12. *Integration of Ownership with Management.* Summarizing CTC's integration proposal, James McCombs, a 5% shareholder, will serve full time as the station's general manager; Aben M. Johnson, a 10% shareholder, will be employed full time as chief engineer and program and operations manager; Aben E. Johnson, a 20% shareholder, will devote an average of about 20 hours per week to the station, supervising its managerial personnel; and Augustus Harper, a 10% shareholder, will be involved in managing CTC's financial affairs. CTC will be credited with the full-time integration of 15% of its ownership (the interests of McCombs and Aben M. Johnson) in cognizable managerial positions. The part-time integration of Aben E. Johnson will also be credited. Harper's part-time integration, however, will not be acknowledged for integration purposes. His duties are vaguely described and there is no evidence as to the amount of time he will devote to station affairs. Since it cannot be found that he would spend 20 hours per week on his duties, his participation is not cognizable. *Midwest Broadcasting Company*, 70 F.C.C. 2d 1489, 1494–1495 (Rev. Bd. 1979), *affirmed* by *Order* (FCC 79–397) released June 22, 1979. Thus from a quantitative standpoint, CTC has shown 15% full-time integration and 20% part time.

13. All of Channel 19's common (voting) stockholders will be involved on a day-to-day basis in the management of its proposed station. Hubert

---

[17] As previously stated Section 73.607(b) of the rules, the 15-mile rule, provides for use of the channel in Shaker Heights. However, this is an exception to the general rule that is embodied in the table of assignments (Section 73.606) and was plainly labeled as such in the *Sixth Report and Order, supra*, at 209, n. 48. Thus, while it is permissible for Channel 19 to propose Shaker Heights as the location of its station, granting that applicant an advantage over one whose proposal is consistent with the basic table of assignments would simply undermine the Section 307(b) determination previously made.

[18] Channel 19 argues that if it is not given a decisive preference under 307(b), it is entitled to a comparative preference for its proposal to locate its studio in Shaker Heights, citing *Jefferson Standard Broadcasting Company*, 33 F.C.C. 471 (1962), *reconsideration denied*, 35 F.C.C. 430 (1963). However, the cities there, Greensboro and High Point, North Carolina, stood in an entirely different relationship to one another. Both were "central cities" with urbanized areas that were not contiguous, and there was little interdependence between them. This is clearly not the case here.

Payne, who owns a majority interest in Diamond Broadcasting, Inc. and will vote its 50% interest in Channel 19, will work full time as the station's general manager. Norman Wain and Robert Weiss, equal partners in Metroplex Communications which owns the remaining 50% of Channel 19's common stock, will each devote 20 hours per week to the station, Weiss as sales manager and Wain as promotions manager. Credit is also claimed for the part-time (20 hours per week) participation of William A. Derrick. Derrick has a small beneficial interest in Channel 19 stemming from his ownership of stock in Diamond's corporate parent; but since Payne will be voting Diamond's stock and has been credited for integration purposes with a 50% interest in Channel 19, Derrick's participation will not be recognized. Thus on a quantitative basis, Channel 19's integration (50% full time and 50% part time) is substantially greater than CTC's (15% full time, 20% part time).

14. Qualitative considerations also favor Channel 19. Payne, Wain and Weiss are all long-time residents of the Cleveland area and all have extensive broadcast experience. Payne has been employed in broadcasting in the Cleveland area for more than 11 years and is presently the regional sales manager at WKYC-TV (Channel 3). Wain and Weiss have owned and operated a number of broadcast stations throughout the country. None is presently located in Cleveland, but their company (Metroplex) has its headquarters there. As described in the findings, all three have ties to various civic, religious and/or professional organizations in the area. Finally, in terms of minority ownership, Payne is black and in addition to being general manager and voting the 50% interest of Diamond, he is president and a director of Channel 19. The applicant thus has 50% minority ownership and a minority member in key operational and policy-making positions.[19] This fact is of particular significance in this case in light of the Cleveland area's large minority population. In the case of CTC, Aben E. Johnson has considerable experience in operating a television station and his son, Aben M. Johnson, is an experienced broadcast engineer. Neither is a local resident, though the younger Johnson plans to move to the area in the event the CTC application is granted. McCombs and Harper are residents of the area and both are black. In addition McCombs has been employed in broadcasting since 1967. Though neither applicant is lacking in attributes that suggest qualitative integration, Channel 19 has significantly greater ties to the community and its minority participation is also greater, both in terms of stock ownership and impact on operational and policy-making activities.

---

[19] It is noted that Derrick, though not credited for integration purposes as an owner, is also black and is an officer and director of Channel 19. Thus two of the four seats on the board of directors are occupied by members of a minority.

15. In view of the foregoing Channel 19 is accorded a decided preference for its integration of ownership with management, its marked quantitative superiority being enhanced by the qualitative features described in the preceding paragraph.

16. *Diversification of Ownership.* Neither CTC nor Channel 19 owns any other medium of communications. Some of their principals do, however, have ties to other broadcast stations. Aben E. Johnson, Jr., president and largest stockholder (20%) of CTC, is also president, general manager and 56.9% stockholder of WXON-TV, Inc., licensee of WXON-TV in Detroit, Michigan.[20] Douglas R. Johnson, a 10% shareholder in CTC, is an officer and director of WXON-TV; and Clifford Beresh, a 10% shareholder and officer and director of CTC, is employed in a managerial position at WXON-TV. No other CTC shareholder owns media-related interests.

17. Channel 19's Wain and Weiss, who have a 50% interest in the applicant and are officers and directors, also own through various subsidiaries six radio stations. None is located in Cleveland or the state of Ohio, the closest being WPKX, Alexandria, Virginia and WVKX(FM), Woodbridge, Virginia.[21] Neither Diamond Broadcasting, Inc., which owns the remaining 50% of Channel 19's voting stock, nor any of its principals holds any other media-related ownership interests.

18. Ordinarily CTC would be accorded a preference under the diversification criterion in light of the stations owned by Channel 19's principals, but because of their great distance from the community for which a license is being sought in this case the preference would be slight. *Minneapolis Star and Tribune Company, 88* F.C.C. 2d *1604* (Rev. Bd. 1982), FCC 82R-7, released February 19, 1982; see also *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393, 395. The question arises, however, as to the weight, if any, which should be accorded the broadcast interests of Channel 19's preferred stockholders. These individuals, primarily Milton Maltz, own an AM and an FM station in Cleveland and have interests in other broadcast stations throughout the country (Findings, para. 41, n. 10). It has been held that their ownership of the Cleveland stations does not warrant disqualification of Channel 19 since, apart form exceptional circumstances not present here, nonvoting stock is not cognizable in applying the multiple ownership rules (Conclusions, para. 5). It would appear, however, that in the context of the comparative issue, some account should be taken of Malrite's broadcast interests in weighing diversification. In a somewhat analogous situation, the Review Board expressed its "reluctan[ce] to ignore completely persons who are

---

[20] Detroit is about 100 airline miles from Cleveland, the two cities being separated by Lake Erie.

[21] The other stations are in Miami, Fort Lauderdale and Clearwater, Florida and St. Louis, Missouri (Findings, para. 41).

technically and legally owners of the applicant." *Robert M. Zitter,* 59 F.C.C. 2d 274, 279 (1976). But because the ownership in that case was in the form of nonvotong rather than voting stock and the stockholders proposed no active role in the applicant's corporate affairs, the negative effect of their presence was substantially mitigated.[22] The evidence shows that this is also the case here. Since the time they became preferred shareholders, the Malrite principals have not participated in corporate decisions and no role is proposed for them if the station should become operational. Though their presence may provide some credibility for Channel 19 in view of Malrite's visibility in broadcasting in the Cleveland area, the record establishes that their involvement will be limited to providing one-third of the capital to be contributed to the corporation in exchange for preferred stock. CTC and the Bureau contend that their influence over the station could be greater but their arguments rest largely on speculation. As in *Zitter (id.* at 277), the direct sworn testimony of the applicant's principals will be accepted since there is no evidence which warrants a different result. This testimony shows that it is the applicant's intent to limit the Malrite principals to the role of investors and there is no persuasive evidence that this will not be the case.[23]

19. In sum it is concluded that the Malrite principals have been effectively isolated from policy decisions and day-to-day operations, and that consequently Malrite's ownership of an AM and FM station in Cleveland is of considerably less significance than if these individuals were voting stockholders in Channel 19 or otherwise held positions of influence. Nonetheless, the presiding officer, like the Review Board in *Zitter,* is reluctant to ignore completely Malrite's interest in Channel 19. Though it is difficult to quantify, that interest seems sufficient to increase CTC's previously accorded preference from slight to moderate.

20. *Promotional Practices at WCKX.* This issue, added by the presiding officer, sought to determine whether WCKX, Clearwater, Florida, a station owned by Wain and Weiss, engaged in deceptive promotional practices, and if so the effect of such acts on Channel 19's qualifications to become a licensee. Primarily, the issue arises from the use of a promotional slogan selected by Weiss which proclaimed WCKX to be "Tampa Bay's New #1 FM." Audience surveys did not show WCKX to be the most

---

[22] In that case the credit for full-time participation in the affairs of the station by the sole common stockholder was slightly reduced in view of the absence of ownership integration by the preferred stockholders. The case was an unusual one in that the capital contribution made by the preferred shareholders for their stock was more than double the amount paid by the common stockholder for his shares. *Id.* at 275.

[23] In this connection it should be noted that Channel 19's common stockholders are not neophytes who might be subject to influence or control by virtue of their lack of experience. Wain and Weiss have an extensive background in broadcast ownership and management; and Payne has years of experience in broadcast sales in the Cleveland area.

listened to station in the market at the time (September 1980), and Weiss testified that no such claim was intended. The evidence shows that the phrase was derived from a marketing study, instituted by the station when it was acquired by Wain and Weiss, in which some public participants used the words to describe their own favorite station. It is doubtful, however, that the ordinary person, viewing the slogan on a billboard or promotional brochure, would interpret it that way. Indeed it seems inevitable that WCKX's use of the phrase would engender precisely the kind of problem that in fact arose: an irate competitor complained and the station, at much inconvenience of itself, abandoned the promotion.

21. On balance it is difficult to attribute much significance to this incident as a decisional factor in the present case. The Commission has recognized that promotional and advertising activities by stations are commonplace and "reflect a healthy competition among licensees . . . ." *Audience Ratings—Distortion*, 58 F.C.C. 2d 513 (1976) at 520–521. The slogan adopted in the instant campaign, which coincided with a change in the station's ownership, was an unfortunate one, and in the circumstances its use cannot be condoned. However, the matter is regarded as an isolated occurrence having no material bearing on Channel 19's qualifications to become a Commission licensee.

22. Several months later, the October/November 1980 Arbitron Radio ratings report for the Tampa-St. Petersburg market was released. The report showed that WCKX had the highest share among adults in the 18–34 age group. Thereafter, for a period of approximately five or six months, WCKX identified itself on-the-air as "Metro Tampa's number one contemporary music station." In addition, for approximately one week at the end of 1980, WCKX broadcast a recorded announcement referring to the Arbitron ratings in which it identified itself as the "new number one contemporary music station" in the metro area. CTC concedes that based on the Arbitron survey, this claim was accurate (CTC Reply to Supplemental Findings, p. 7) but contends, as does the Bureau, that it does not fully comport with "guidelines" issued by the Federal Trade Commission in 1965 (see *Broadcast Ratings*, 1 F.C.C. 2d 1078 (1965)). The FTC document referred to is a news release which, among other things, cautions broadcasters against using survey data to create a "misleading impression" by "unfairly basing audience claims" on limited data. The record in this case does not establish that the announcements made use of survey data in a way that was unfair or inaccurate. Accordingly, it is concluded that the matter is of no decisional significance. See *WAVI Broadcasting Corp.*, 32 F.C.C. 2d 421, 425 (1971).

*Summation.*

23. Having concluded that Channel 19 is not in violation of Section 73.636(1) and Note 8 thereto, and that its proposal to locate its station in

Shaker Heights does not entitle it to a favorable decision under Section 307(b) of the Communications Act, the dispositive question is whether on a comparative basis the public interest would be better served by a grant to CTC or Channel 19. CTC has received a preference because its proposal provides greater media diversification and Channel 19 has been awarded a preference for its greater integration of ownership with management. The diversification preference is not a strong one, however, since the media interests of Channel 19's common stockholders are in cities many miles from Cleveland. Its preferred stockholders own two stations in Cleveland, and others elsewhere, but they hold no positions in the corporation from which they could control or significantly influence the policies or day-to-day operation of the proposed station; their presence in the Channel 19 application has therefore been given substantially less weight than if they were voting stockholders. On the other hand Channel 19's integration proposal is markedly superior to CTC's. Its full-time general manager, a black local resident with considerable broadcast experience, votes 50% of the stock and is the president and a director of the corporation; the remaining stock is held by two local residents with extensive experience in broadcasting who will serve part time in managerial positions. It is concluded that Channel 19's margin of superiority in this area of comparison is sufficient to outweigh the negative effects of its principals' existing media interests and that a grant of its application would better serve the public interest.

Accordingly, IT IS ORDERED that unless an appeal from this Intial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of Channel 19, Inc. IS GRANTED and the application of Cleveland Television Corporation IS DENIED.[24]

FEDERAL COMMUNICATIONS COMMISSION

John H. Conlin
Administrative Law Judge

[24] In the event exceptions are not filed *within 30 days after the release of this Initial Decision*, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Fairness Doctrine, Political Party Doctrine
Political Broadcast, Exempt Program

Complaint filed against CBS, Inc. denied. *Zapple* doctrine does not apply to same categories of bona fide news programming exempt from equal opportunities under Section 315. In determining whether news programming is exempt, broadcaster expected to make reasonable, good faith decisions based upon newsworthiness, not for the purpose of advancing a candidate or the candidates of a particular political party.
—*Democratic National Committee*

FCC 82–477

**BEFORE THE**

# FEDERAL COMMUNICATIONS COMMISSION

**WASHINGTON, D.C. 20554**

In re Complaint of

Democratic National Committee

Democratic Senatorial Campaign Committee

Democratic Congressional Campaign Committee

against

Columbia Broadcasting System, Inc.

## Memorandum Opinion and Order

Adopted: October 28, 1982; Released: October 28, 1982

By the Commission: Commissioner Fogarty concurring in the result; Commissioner Rivera absent.

1. The Commission has under consideration a complaint, filed October 15, 1982, against CBS Inc., and its owned and operated television stations, by the Democratic National Committee, Democratic Senatorial

Campaign Committee, and Democratic Congressional Campaign Committee (DNC).[1] The complaint asserts that CBS, in its airing of President Ronald Reagan's address at 7:30 p.m., October 13, 1982, triggered a *Zapple* obligation [*Nicholas Zapple*, 23 FCC 2d 707 (1970)][2] under the Fairness Doctrine to afford the DNC a twenty-three minute quasi-equal opportunity. DNC complains that CBS aired a "clearly partisan address" by the President "so close to a national election that it was by its nature, timing and content a program supporting the candidacies of Republican candidates for public office, [and that CBS] failed to provide free to a spokesperson from the Democratic party an amount of time equal in length and placement."[3]

2. In characterizing the President's address "as a partisan political effort," DNC asserts it "constituted an address by 'supporters' of candidates for public office," and thus is subject to the Commission's *Zapple* decision. DNC asserts "[i]t was, in fact, a political message delivered by the President acting in his role as head of his political party." DNC acknowledges that inherent in the Presidency is the need to address the American people to discuss a national crisis or other important policy matters, and that the networks have a responsibility to bring such messages to the public. DNC believes, however, that CBS has abused its discretion in this instance.

3. DNC states it repeatedly requested a quasi-equal opportunity from CBS which was denied. Instead of this, states DNC, CBS aired a thirty-minute program entitled "Voices of Opposition" at 11:30 p.m., the same evening, featuring individuals CBS selected to represent the Democratic viewpoint. DNC believes CBS has violated *Zapple* in several respects. First, the programming was clearly not in a time period reasonably calculated to reach an equivalent audience; secondly, CBS did not afford the Democratic party the right to select the spokesperson or coordinate

---

[1] On October 20, 1982, the Broadcast Bureau initiated an inquiry of CBS concerning this complaint. CBS responded by letter dated October 22. The American Legal Foundation also filed comments on this date. DNC filed its reply to CBS' response on October 25.

[2] The *Zapple* doctrine applies to the sale or furnishing of time to the supporters of or spokespersons for legally qualified candidates. Where candidate A's supporters are sold or given broadcast time during which candidate A will not appear, candidate B's supporters must be sold or given comparable amounts of time in a similar time slot ("quasi-equal opportunities."). *See The Law of Political Broadcasting and Cablecasting*, 69 FCC 2d 2209, 2302 (1978).

[3] In support of its complaint DNC alleges the Republican National Committee (RNC) contacted CBS and NBC in September for the purpose of purchasing prime time during the week of October 11, which both networks declined. Thereafter, DNC asserts, CBS and NBC were informed by the White House that the President wanted time on the networks during prime time on October 13, 1982, to address the American people on the state of the economy. DNC states that, on October 11, telegrams from the DNC were forwarded to all three networks requesting that this address not be covered because it constituted "last minute partisan campaigning by the President" and thus would obligate the networks to provide free time under *Zapple* to supporters of Democratic candidates. DNC states that NBC offered an equivalent amount of time for broadcast October 14, at 7:30 p.m., or the remaining 6 minutes immediately following the President's address. ABC did not carry the address.

the program's format. In this context, DNC argues that *Zapple* requires, within the quasi-equal opportunity concept, the right of the opposing Democratic candidates themselves or DNC to select their own spokespersons. Because under *Zapple* supporters of opposing candidates "have a contingent right of access," DNC argues that "the selection of the appropriate spokespersons is committed to the discretion of the candidate or his authorized agents." DNC concludes that "CBS should be required to broadcast a presentation by a DNC spokesperson in prime time prior to election day, November 2, 1982."

4. On October 22, CBS filed its response to our inquiry. CBS asserts that the Commission "had made clear that the *Zapple* doctrine does not as a general matter apply to [p]residential appearances—even if they are alleged to be motivated by partisan purposes—in view of the importance of permitting the President to report to the American public."[4] Thus, CBS argues, the President's address is subject only to general Fairness Doctrine principles that require presentation of contrasting views in its overall programming rather than "quasi-equal opportunities." CBS urges dismissal because DNC failed to raise a general fairness violation.

5. CBS states that its presentation of the President's address constituted coverage of a "bona fide news event," which, if the President were a legally qualified candidate, would be exempt from equal opportunities under Section 315. CBS further states that on October 7 the White House informed its news department through its Washington bureau that President Reagan planned a "major speech" on the nation's economy at 7:30 p.m., October 13; and that the White House indicated that the "speech would consist of a review of President Reagan's economic policies and would include a discussion, among other subjects, of how the Administration would deal with the unemployment situation and the Administration's economic priorities for the special session of Congress beginning November 29." CBS asserts that central to its decision to cover the address were "dramatic" economic developments in the days immediately preceding the President's speech: (1) the release of statistics showing unemployment at a forty-year high; (2) a significant decline in interest rates; and (3) a major stock market rally.

6. CBS contends that the "partisan" nature or intent of such an address is not a factor in assessing the newsworthiness of a broadcast. Lastly, CBS asserts that even if *Zapple* were applicable it would still maintain the discretion to select appropriate spokespersons.

7. The American Legal Foundation (ALF) generally supports CBS's position and states that: (1) the Commission has previously refused to

---

[4] CBS cites *Republican National Committee*, 25 FCC 2d 739 (1970), *rev'd on other grounds sub nom. Columbia Broadcasting System, Inc. v. FCC*, 454 F.2d 1018 (D.C. Cir. 1971); *Democratic National Committee*, 31 FCC 2d 708 (1971), *aff'd sub nom. Democratic National Committee v. FCC*, 460 F.2d 891 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 843 (1972).

extend *Zapple* to presidental addresses; (2) a finding that the address was not newsworthy would unnecessarily intrude into the journalistic discretion of broadcasters infringing upon their First Amendment rights; and (3) DNC's request is contrary to the Congressional scheme that "equal opportunities shall be applicable to appearances of legally qualified candidates and that in other instances 'fairness' [shall] be applicable. . . ." *Fairness Report*, 48 FCC 2d 1, 41. Lastly the ALF believes that even if *Zapple* were applicable, CBS has fulfilled its obligation to offer "comparable" time in its "Voices of Opposition" broadcast.

8. On October 25, DNC filed its reply to CBS' response. Again DNC argues that *Zapple* can apply to a presidential speech and "it *does* apply here since the speech cannot be likened to a bona fide, nonpartisan news event." DNC acknowledges precedent in which the Commission refused to apply *Zapple* to "*all presidential speeches.*" *In other words, DNC contends that the Commission merely refused to apply an automatic Zapple* approach to every presidential speech, not that it could never be applied. Further, DNC contends that previous cases where the Commission refused to extend *Zapple* to presidential speech are distinguishable because they involved addresses in nonelection periods. In this context DNC cites the *Fairness Report*, *supra*, at 41, where the Commission indicated:

> We are not dealing here with [p]residential appearances during election campaigns where equal opportunities or *Zapple* . . . would ordinarily be applicable.

9. Finally, DNC believes that the Commission must appropriately review CBS' judgment in covering the President's speech as a bona fide news event. In this regard it submits copies of numerous newspaper articles, which refer to comments by journalists, including several CBS commentators, who describe the address as being partisan. DNC believes the documented press reaction coupled with the attempt by RNC to purchase time for the same week can only lead to the conclusion that CBS' decision to cover the address as a bona fide news judgment was unreasonable.

*Discussion*

10. It has been our practice in deciding complaints arising under the equal opportunities provision of Section 315 and the *Zapple* doctrine to determine first if the broadcast in question came within one of the news exemptions of the Statute.[5] In 1959 Congress amended Section 315 by

[5] Because of our decision below that the broadcast in question falls under the news exemption, we need not decide whether the program was by supporters or spokespersons advocating the election or defeat of a party's candidate; nor need we rule on CBS's argument that *Zapple* does not apply to presidential addresses broadcast to the nation.

exempting certain categories of bona fide news programming from equal opportunity obligations.[6] Congress was motivated by the Commission's *Lar Daly* ruling in early 1959 where it was determined that a mayoral candidate in Chicago was entitled to equal opportunities in response to his opponent's appearance on a television newscast. Congress, recognizing the potential inhibition such a decision would have upon broadcasters in their coverage of political discussion, reacted quickly. It was intended that these news exemptions would remove any reluctance by broadcast journalists to cover political campaigns.[7] In addition to the news exemptions Congress also incorporated Fairness Doctrine language into Section 315(a).[8] It was added in part to insure that the news exemptions would not be interpreted to mean that the Fairness Doctrine is not applicable to *issues* discussed by candidates during the news. Thus, although a candidate's appearance on bona fide news programming does not trigger equal opportunities, the controversial public issues discussed during such an appearance are subject to general Fairness Doctrine obligations.

11. The Fairness Doctrine language was also added to insure that broadcasters could not circumvent the intent of Section 315 by their disproportionate presentation of candidates' supporters or spokespersons. In this connection, in 1970 the Commission was asked to rule upon the appropriate application of the Fairness Doctrine to appearances by supporters or spokespersons of a candidate. In its Zapple ruling the Commission articulated a "quasi-equal opportunities" concept modeled in

---

[6] Section 315(a) provides in pertinent part:

> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—
>
> (1) bona fide newscast,
> (2) bona fide news interview,
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),
>
> shall not be deemed to be use of a broadcasting station within the meaning of this subsection.

[7] Senator Spessard Holland's remarks reflect congressional intention:

> [To] enable what probably has become the most important medium of political information to give the news concerning political races to the greatest possible number of citizens, and to make it possible to cover the political news to the fullest degree. [105 Cong. Rec. 14451 (1959).]

[8] The language immediately following the exemptions provides:

> Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and *to afford reasonable opportunity for the discussion of conflicting views on issues of public importance*. [Emphasis added.]

most respects after Section 315.[9] Being consistent with the intent of Section 315, *Zapple* is also inapplicable to appearances by supporters on the same categories of bona fide news programming exempt from equal opportunities.[10]

12. CBS asserts that its decision to air President Reagan's address was based upon its determination that it was affording coverage of a "bona fide news event." We have been furnished no evidence which persuades us that this judgment is unreasonable or was not made in good faith. In evaluating a licensee's or network's state of mind or intent, it of course is necessary and appropriate for the Commission to look at circumstances and indicia surrounding the event in question. We note CBS' claim that it reached its decision to cover the address based on major economic developments in the day preceding October 13, as well as, the White House's assertion that it was a "major address" on the economy. We will not disturb a broadcaster's journalistic news discretion based upon bare allegations, assertions or speculation. Nor, as we explain more fully below, will we disturb the bona fides of particular news programming based on an after-the-broadcast analysis. Thus, as bona fide news programming, the President's October 13 address is not subject to *Zapple* obligations. It is, however, subject to the Fairness Doctrine generally. Because DNC does not even purport to raise a *prima facie* Fairness Doctrine complaint concerning CBS' airing of contrasting views in its overall programming, we need not address this aspect further.

13. DNC has argued that the "partisan" content and intent behind the President's address requires a *Zapple* response. Precedent and Section 315's legislative history are to the contrary. It is not the partisan political purpose of the speaker that is controlling; rather it is the intent of the broadcaster in making a judgment whether to carry specific news programming.[11] In short, it is recognized that political discussion is inher-

---

[9] Section 315 provides equal opportunity rights to all legally qualified candidates. *Zapple* affords quasi-equal opportunities to supporters or spokespersons of "major" candidates only. Thus, consistent with the Fairness Doctrine generally, the broadcaster maintains discretion to afford time to the supporters of candidates it determines are significant.

[10] In the *First Fairness Report*, 36 FCC 2d 40, 50 n.12 (1972), the Commission stated:

> In view of the 1959 [a]mendments, it follows that no quasi-equal opportunities doctrine is applicable when supporters or spokesmen for candidates are presented in bona fide newscasts; in this respect, the same general fairness principles that apply to the candidates are equally applicable to their supporters.

It is clear from the statement in the text to which the footnote applies and to the reference to the 1959 amendments that *Zapple* does not apply to any of the four news categories exempted by the 1959 amendments.

[11] Thus, in affirming the Commission's *Aspen Institute*, the Court of Appeals upheld the Commission's position that:

> Congress chose to determine the bona fides of coverage by looking at *the intent of the broadcaster rather than at the intent of the candidate . . . since a candidate always intends to advance* his candidacy. [Chisholm v. FCC, 538 F.2d 349, 359 n.21 (D.C. Cir. 1976.] [Emphasis added.]

ently partisan.[12] To place the broadcaster and ultimately the Commission in the role of assessing the content of speech contained in news programming to determine whether it was partisan would be an inappropriate and impracticable intrusion. Congress in enacting Section 315 and the Commission in its *Zapple* decision demonstrated concern with the broadcaster's role. If the broadcaster intends to further a candidacy rather then affording coverage solely because of its newsworthiness, then and only then did Congress indicate an intention to remove the bona fides of particular news programming.[13] Moreover, it is inappropriate to place the threat of losing exempt status on an after-the-broadcast scrutiny of the text or other characteristics of news coverage. In affirming our ruling in *Kennedy for President Committee*, 76 FCC 2d 201 (B/c Bur. 1980), *review denied*, 77 FCC 2d 971 (1980), the Court of Appeals stated:

> We find eminently reasonable, too, the Commission's reading of Section 315(a) to require broadcasters to appraise newsworthiness *prior* to broadcast of the questioned event. Were the Commission to hinge operation of the equal opportunity provision on after-the-fact reexamination of the event broadcast, the purposes for which Congress enacted Section 315(a) exemptions would largely be set for naught. Broadcasters could never be sure that coverage of any given event would not later result in equal opportunity obligations to all other candidates; resultantly, broadcaster discretion to carry or not to carry would be seriously if not fatally crippled. [*Kennedy for President Committee v. FCC*, 636 F.2d 417, 429–30 (1980).] [Emphasis added.][14]

---

Although President Reagan is not currently a candidate, it is asserted that in advancing Republican candidacies, the bona fides of this coverage for *Zapple* purposes should be reviewed. Again, consistent with the intent of Congress in enacting Section 315, it is the intent of the broadcaster that determines whether coverage is bona fide.

[12] In this context the Commission has stressed:

> Presidents and other public officials (e.g., governors, mayors) do report to the public, and such reports, as we have said, contribute to an informed citizenry. Of course, the officials in such reports are most often engaged in setting forth the wisdom of the particular actions on which the reports are given. But this does not mean that this is a political party appearance to which . . . equal opportunities "is applicable." If that were so, the Commission would have, in effect, amended the Communications Act to specify that equal opportunities applies to all appearances of public officials. [*Democratic National Committee*, 31 FCC 2d 708, 712.]

[13] Representative Oren Harris stated during floor discussion in the House that:

> It sets up a test which appropriately leaves reasonable latitude for the exercise of good faith news judgment on the part of broadcasters and networks. However, it is not intended that the exemption shall apply where such judgment is not exercised in good faith. For example, to state a rather extreme case, the exemption from Section 315(a) would not apply where the program, although it may be contrived to have the appearance or give the impression of being a newscast, news interview, or on-the-spot coverage of news events, is not presented as such by the broadcaster or network in good faith, but in reality had for its purpose the promotion of the political fortunes of the candidate making an appearance thereon. [105 Cong. Rec. 17782 (1959).]

[14] The Court of Appeals also stated with respect to an allegation that a presidential press conference was used for political purposes that:

> We think the Commission steers the right course in declining to undertake assessments on the much of a difference. As the Commission aptly stated, "to draw such distinctions would require [it] to make subjective judgments concerning content, context and potential political impact of a candidate's appearance," and "[n]either Congress nor the Commission desires to expand governmental oversight of broadcaster's professional journalistic functions. [*Id.* at 429.] [Footnotes omitted.]

Furthermore, this Commission has held that:

> Once the program is determined to be exempt from Section 315 obligations because it is on-the-spot coverage of a news event, the fact that a candidate uses the program for his political benefit does not make the program any less exempt. [*Republican National Committee*, 37 FCC 2d 799, 807 (1972).]

14. It is clearly inappropriate to evaluate the reasonableness of CBS' news judgment based upon an analysis of the President's address there were sufficient grounds for CBS to refuse to carry it; and we note that one of the other major networks apparently came to this conclusion. However, this does not establish bad faith or unreasonableness. It merely demonstrates that journalists differed regarding the newsworthiness of the President's address. Unless we are furnished evidence that in deciding to carry programming as news the broadcaster intended to advance a speaker's candidacy or the candidacies of the speaker's party, we would be acting contrary to Congress' intent by substituting our judgment for that of professional journalists in evaluating the newsworthiness of particular programming.[15]

15. Accordingly, based upon the inherent newsworthiness of presidential speech, the major economic developments preceding October 13, and the statements by the White House regarding the significance of the upcoming Presidential address, it was clearly within CBS' discretion as a professional journalist to decide before the fact whether the address was worthy of news coverage. The proximity to elections is just one of many factors that journalists could consider in evaluating whether to provide news coverage. To rule otherwise would discourage the coverage of presidents as well as other public officials merely because the timing is too close to an election. This is precisely why Congress acted to exempt bona fide news programs from equal opportunities. It would be inconsistent with this congressional intent for the Commission to rule differently and apply *Zapple* to bona fide news programming.

16. Accordingly, in view of the above considerations, the complaint IS DENIED.

17. Because of the proximity of the election, IT IS FURTHER ORDERED that Section 1.4(b) of our rules (47 C.F.R. § 1.4(b)) is waived, and the effective date and date of public notice of this document is October 28, 1982, the date this document was adopted.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico *Secretary*

---

[15] The Court of Appeals agreed with the Commission's policy in determining whether an event is bona fide, approving that "absent evidence of broadcaster intent to advance a particular candidacy, the judgment of the newsworthiness of an event is left to the reasonable news judgment of professionals." *Chisholm*, *supra*, at 359 (footnote omitted).

CATV Program Exclusivity, Network Programming
Reconsideration, Petition For, Grant of
Rules, Waiver of

Request for reconsideration of prior decision denying waiver of significantly viewed exemption to network program nonduplication rules, for twenty-four month period granted. B/cers submissions indicate that loss of nonduplication protection appears to have had negative effect on the station's audience along with financial difficulties warrant temporary relief.
—*Desert Empire Television Corporation*

FCC 82–471

**BEFORE THE**

# FEDERAL COMMUNICATIONS COMMISSION

**WASHINGTON, D.C. 20554**

| | |
|---|---|
| In re: | |
| DESERT EMPIRE TELEVISION CORPORATION | CSR–1340 |
| Petition for Reconsideration | |

MEMORANDUM OPINION AND ORDER

Adopted: October 28, 1982; Released: November 4, 1982

BY THE COMMISSION: COMMISSIONER JONES DISSENTING AND ISSUING A STATEMENT; COMMISSIONER RIVERA ABSENT.

*Introduction*

1. Desert Empire Television Corporation (hereinafter "KMIR-TV"), licensee of Station KMIR-TV (NBC, Channel 36), Palm Springs, California, has filed a "Petition for Reconsideration" of the Commission's decision in *Desert Empire Television Corporation*, FCC 81–196, 86 FCC 2d 644 (1981). KMIR-TV's petition is opposed by Palmer Communications, Inc. d/b/a Coachella Valley Television (hereinafter "Palmer"), operator of a cable television system serving Palm Desert, California, and neighboring communities, and by Warner Amex Cable Communications, Inc. (here-

inafter "Warner"), operator of a cable television system serving Palm Springs, California, and surrounding unincorporated areas of Riverside County, California. KMIR-TV has replied, and has subsequently also filed an "Emergency Petition for Temporary Relief" in this proceeding. This pleading is opposed by Warner and by Palmer, and KMIR-TV has replied.[1]

2. KMIR-TV seeks a waiver of Section 76.92(g) of the Commission's Rules. That rule, which was affirmed by the Court of Appeals in *Spartan Radiocasting Co. v. Federal Communications Commission*, 619 F.2d 314 (4th Cir. 1980), holds that local broadcasters are not entitled to network program nonduplication protection against significantly viewed distant signals. KMIR-TV wants such protection, however, vis-a-vis Station KNBC-TV (NBC, Channel 4), Los Angeles, California, which is significantly viewed in central Riverside County (hereinafter "Riverside Central"). In *Desert Empire Television Corporation, supra*, the Commission found that KMIR-TV had not met the requisite burden of proof to be granted a waiver of Section 76.92(g) of the Rules. Accordingly, KMIR-TV's request was denied.

*Summary of Pleadings*

3. In support of its "Petition for Reconsideration," filed June 8, 1981, KMIR-TV reiterates its prior argument that KNBC-TV is not significantly viewed in Riverside Central, even though KNBC-TV is on the Commission's list of significantly viewed signals.[2] Citing January 1980 Arbitron data, KMIR-TV states that over 99.9% of the television households in Riverside Central are cable subscribers. While KMIR-TV's audience share may have increased in recent months, as noted by the Commission in *Desert Empire Television Corporation*, 86 FCC 2d at 650 n. 10, KMIR-TV argues that this is because it still receives nonduplication protection from the area cable systems on which it is carried. KMIR-TV acknowledges that engineering studies which it had previously submitted were not significant viewing surveys conducted pursuant to Section 76.54 of the Rules, but contends that no such survey could be conducted in a statistically significant manner given the near-total cable penetration in Riverside Central. KMIR-TV again questions the accuracy of the 1972 and 1976 surveys which showed KNBC-TV to be significantly viewed in

---

[1] *But see* note 10, *infra*. In addition, Group W Cable, Inc. (hereinafter "Group W"), operator of a cable system serving Yucca Valley, California, and neighboring communities, has filed comments in opposition to KMIR-TV's pleadings. Group W notes, however, that KMIR-TV does not now seek relief against Group W's system, and KMIR-TV confirms this.

[2] This list, printed in the *Reconsideration of the Cable Television Report and Order*, FCC 72–530, 36 FCC 2d 326, 383 app. B (1972), was originally compiled in 1972, when the Commission developed its distant signal rules for cable television. To maintain continuity of service to the public, stations on this list are not subject to deletion. *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 143, 175 n. 45 (1972).

Riverside Central, submitting a letter from Arbitron which indicates that certain families which had been surveyed believed in error that they were not on cable. Therefore, KMIR-TV asserts that KNBC-TV is not readily available to Riverside Central viewers over-the-air, and should not benefit from the nonduplication exemption of Section 76.92(g) of the Rules, citing *Spartan Radiocasting Company v. FCC*, *supra*, and *KDUB-TV, Inc.* (Dubuque, Iowa), FCC 80–624, 83 FCC 2d 153, 157 (1980), *recon. denied*, FCC 81–62, *supra*. KMIR-TV urges the Commission to conduct its own field tests of KNBC-TV's receivability in the Palm Springs area, or at least to grant KMIR-TV's petition pending the performance of a study by KMIR-TV itself.

4. KMIR-TV argues that its financial history since 1975 shows chronic difficulties. The station notes that it suffered losses of $67,202 in 1975; $107.891 in 1976; and $21,837 in 1977. While the station reported profits of $138,071 in 1978; $14,663 in 1979; and $32,943 in 1980, KMIR-TV contends that over the years it has been loaned by its owners, Mr. and Mrs. John Conte, ". . . such funds as have been necessary to sustain its operation. At no point in the last three years has the principal balance due on the Conte's loan dropped below $1,250,000." According to KMIR-TV it is these low-interest loans which have subsidized its operation and made possible its profits. Moreover, alleges KMIR-TV, although the total rental value of the building housing the station's studio and offices was $438,900 from November 1, 1978 through December 31, 1980, Mrs. Conte was paid only $112,000 in rent during this period. Citing the *Notice of Inquiry in Docket No. 21284*, FCC 77–407, 65 FCC 2d 9 (1977), KMIR-TV argues that, absent waiver, it will lose approximately 50% of its total network broadcast revenues, approximately two-thirds of which KMIR-TV attributes to network advertising and network compensation. Based on 1980 gross non-barter advertising revenues of $921,499, KMIR-TV projects this loss at over $260,000. KMIR-TV claims that this entitles it to waiver, citing *KMSO-TV, Inc.* (Missoula, Montana), FCC 77–725, 66 FCC 2d 603 (1977); *Harriscope Broadcasting Corp.* (Great Falls, Montana), FCC 77–165, 64 FCC 2d 589 (1977), *recon. denied*, FCC 78–539, 68 FCC 2d 1390 (1978); *KID Broadcasting Corporation* (Idaho Falls, Idaho), FCC 76–1052, 61 FCC 2d 1155 (1976), *recon. denied*, FCC 77–354, 65 FCC 2d 169 (1977); and *Four States Television, Inc.* (Farmington, New Mexico), FCC 76–533, 59 FCC 2d 1159 (1976). KMIR-TV notes that it presents ". . . live, locally originated news broadcasts at 6:00 p.m. and 11:00 p.m. each weekday," which would not be expected from KNBC-TV, yet this local news operation would have to be "disproportionately reduced" were revenues to decline considerably.

5. Palmer opposed KMIR-TV's petition on July 24, 1981. Palmer argues that Section 76.54 of the Rules does not specify a minimum number of homes to be surveyed, and that in fact the rule takes sample size into

account, citing *Desert Empire Television Corporation*, 86 FCC 2d at 649, 649 n. 6. Were KMIR-TV's argument to be accepted, claims Palmer, no Los Angeles station would be significantly viewed in Riverside Central. Palmer additionally disputes the relevance of the alleged errors in the prior Arbitron surveys, again contending that it is viewing levels which are relevant, not the number of homes surveyed. Palmer characterizes KMIR-TV's financial extrapolations as speculative, citing *Northern New England Television (WNNE-TV)* (Hanover, New Hampshire), FCC 80–721, 83 FCC 2d 418, 427–428 (1980), *recon. denied*, FCC 82–124, 89 FCC 2d 458 (1952), and urges denial of KMIR-TV's petition.

6. Warner opposed KMIR-TV's petition on July 24, 1981. Warner argues that the only new facts which KMIR-TV pleads on reconsideration are that the station earned profits in 1978–1980, which, contends Warner, does not entitle KMIR-TV to relief. Warner notes that in its original petition, KMIR-TV conceded that KNBC-TV met the significant viewing test levels for Riverside Central, and asserts that KMIR-TV's subsequent submissions do not refute this. As does Palmer, Warner argues that high cable penetration levels do not preclude significant veiwing surveys, and notes its own surveys filed in *Scranton Broadcasters, Inc. and WBRE-TV, Inc.*, FCC 82–58, 88 FCC 2d 1482 (1982). In any event, states Warner, citing *inter alia*, the *Cable Television Report and Order, supra*, signals listed as significantly viewed are not subject to subsequent deletion. Warner contends that the crucial inquiry herein is whether the impact of Section 76.92(g) on KMIR-TV will result in a loss of service to the public, and denies that KMIR-TV has made such a showing. Warner alleges that KMIR-TV's submissions demonstrate that the station is making "financial progress," which cannot entitle it to special relief, citing *Northern New England Television, supra*. Warner argues that the Commission has already noted KMIR-TV's failure to submit sufficient financial data, citing *Desert Empire Television Corporation*, 86 FCC 2d at 648 n. 7, and argues that KMIR-TV has still failed to meet its burden of proof on this issue. In addition, citing the *Report in Docket No. 21284*, FCC 79–241, 71 FCC 2d 632, 692 (1979), Warner denies that application of Section 76.92(g) of the Rules—affecting only a single station, KNBC-TV—will divert half of KMIR-TV's audience and revenues, given that the Commission has concluded that the presence on cable of five independent and four network stations in the Palm Springs market has an impact on the local stations[3] of from 10.4% to 19.2%. Moreover, notes Warner, according to *id.* at 692, 713, overall broadcast revenues in the Palm Springs market continue to increase, even in the face of high cable penetration. Warner notes that KMIR-TV states that it is presently

[3] In addition to KMIR-TV, Station KESQ-TV (ABC, Channel 42) is licensed to Palm Springs. Its licensee is Pacific Media Corp. (hereinafter "KESQ-TV").

considering reducing its news staff, even though the station still receives nonduplication protection, thus indicating that such cutbacks are not the result of Section 76.92(g) of the Rules. Warner concludes generally that KMIR-TV's showing is insufficient to justify the requested waiver, and that the Commission cannot insure every licensee's viability and profitability.

7. Following a motion for extension of time, to which Warner and Palmer consented,[4] KMIR-TV replied to the oppositions on August 14, 1981.[5] KMIR-TV notes initially that its request is not opposed by KNBC-TV, and that neither Warner nor Palmer have claimed that grant of the requested waiver would impact their systems adversely. Cable subscribers, states KMIR-TV, would lose no NBC programming, but the station maintains that any reduction of its audience would be critical in view of KMIR-TV's marginal financial status. KMIR-TV argues that it does not seek KNBC-TV's deletion as a significantly viewed signal, but merely seeks the FCC-enforced nonduplication protection it had vis-a-vis KNBC-TV prior to the adoption of Section 76.92(g) of the Rules. KMIR-TV contends that the Commission must consider the viewing data it has submitted, which necessarily must be unique to its 99% cable-penetrated market.[6]

8. KMIR-TV again asserts that Arbitron's earlier surveys were based in part on mistaken information, and notes that Riverside Central's boundaries today are not those of 1972.[7] KMIR-TV argues that Arbitron's data are still inconsistent, because in some cases the data credit Los Angeles stations with relatively high ratings during times of nonduplication protection. KMIR-TV denies that it must make its FCC Forms 324 available beyond the Commission's physical premises, and maintains that the data the station has submitted demonstrate its precarious financial position, and that only continued subsidies by KMIR-TV's owners have sustained the station during 1978–1980. KMIR-TV claims that the *Report in Docket No. 21284, supra,* is irrelevant to nonduplication protection, and is concerned rather with distant signal importation assuming the existence of nonduplication protection. Additionally, asserts KMIR-TV,

---

[4] Group W did not oppose this motion.

[5] KMIR-TV concurrently filed a "Motion for Acceptance of Reply Three Pages in Excess of Page Limit." Pursuant to Sections 1.48(b) and 1.106(h) of the Rules, such motions must be filed within two business days of the last date for filing oppositions, which was June 23, 1981. However, no objections have been filed to extended filing periods to date in this proceeding. Accordingly, we shall accept—and grant—KMIR-TV's late-filed motion.

[6] KMIR-TV claims that those few residents which do not subscribe to cable are likely located in favorable pockets of reception for Los Angeles signals, and hence any sampling of such television households would offer an unrepresentative view of the market.

[7] Before 1973, states KMIR-TV, Riverside Central ". . . included the mountain pass areas of Beaumount and Banning, where there is some off-air reception of Los Angeles signals." These areas have since been assigned to Riverside West.

the data utilized in the *Report in Docket No. 21284, supra,* suffers from the same erroneous information as do the prior Arbitron data. KMIR-TV contends that although the total number of television homes in the Palm Springs ADI grew from 42,600 in 1977 to 52,900 in 1981, KMIR-TV's and KESQ-TV's combined viewing audience has remained static. In addition, argues KMIR-TV, while market revenues may have increased by 40% during 1972–1977, "the Consumer Price Index during the same five-year period rose 45%." (footnote omitted). Accordingly, states KMIR-TV, its presumption of 50% audience and revenue loss absent waiver is reasonable.

9. On May 28, 1982, KMIR-TV filed an "Emergency Petition for Temporary Relief," seeking an order requiring Warner and Palmer to continue to provide nonduplication protection to KMIR-TV pending the outcome of the instant proceeding, and also an extension of such relief pending judicial review should KMIR-TV's instant "Petition for Reconsideration" be denied. KMIR-TV states that this request is necessary because it has been informed by both Palmer and Warner that the cable systems intend to cease providing nonduplication protection to KMIR-TV as of June 1, 1982. KMIR-TV reiterates its prior arguments, and also submits copies of its prior pleadings in this matter. In addition, KMIR-TV submits an Arbitron special study commissioned by KESQ-TV, and argues that the study demonstrates that, absent nonduplication protection, KESQ-TV's total audience would be reduced by 47%, from a 19 share to a 10 share. At the same time, Station KABC-TV (ABC, Channel 7), Los Angeles, California, would experience an increase from a 7 share to a 16 share. KMIR-TV contends that its audience would be affected in a substantially similar manner, citing *KDUB-TV, Inc.* (Dubuque, Iowa), FCC 81-530, 88 FCC 2d 450 (1981), *recon. denied,* FCC 82–182, 89 FCC 2d 994 (1982). KMIR-TV states that KESQ-TV joins it in its request for temporary relief, and contends that the stations seek only to ". . . maintain the *status quo* that has existed since [the 1960s]." KMIR-TV argues that the cable systems would not be burdened by grant of the temporary relief because the nonduplication switching is performed for them by the local stations. In addition, claims KMIR-TV, because only simultaneously duplicating programming would be blacked out, "no cable subscriber would be inconvenienced in any way." [citation omitted].[8]

10. Warner opposed KMIR-TV's request for temporary relief on June 11, 1982.[9] Initially, Warner summarizes the arguments raised in this

---

[8] Concurrently with its "Emergency Petition for Temporary Relief," KMIR-TV submitted a letter to Chairman Mark S. Fowler, requesting that "immediate attention" be given to KMIR-TV's petition, and reviewing its arguments in favor of the petition. The letter was served on all Commissioners and on all parties. KMIR-TV also states that KESQ-TV joins it in its request for temporary relief.

[9] Although oppositions were due on June 4, 1982, pursuant to Section 1.45(d) of the Rules, the filing period was extended by one week. This same rule, however, prohibits the filing of replies to oppositions to petitions for temporary relief or for stay. Accordingly, KMIR-TV's reply filed on June 18, 1982, will be dismissed. *See, e.g., Smaller Market UHF Television Stations Group,* FCC 80–528, 81 FCC 2d 429, 435 (1980).

proceeding to date. Warner argues that KMIR-TV has yet to introduce evidence which rebuts KNBC-TV's status as a significantly viewed signal in Riverside Central. Nor, contends Warner, has KMIR-TV substantiated its claim that a waiver is necessary to avoid a diminution of service to the public. Warner again notes that KMIR-TV reported profits during 1978–1980, and contends that the station is making financial progress, citing *Liability of Desert Empire Television Corporation*, FCC 82–30, 88 FCC 2d 1413, 1417 (1982). Warner reiterates its earlier argument that KMIR-TV's cutbacks appear to be due to factors other than the elimination of nonduplication protection, and questions KMIR-TV's assumption that, absent waiver, it will lose half of its cable audience and revenue. Warner asserts that KESQ-TV's Arbitron study is not relevant to the question of impact to KMIR-TV, and addresses only the question of diary editing, not the loss of nonduplication protection. Warner notes that it has not been obligated to afford nonduplication protection to KMIR-TV since May 1980, and argues that the temporary relief requested actually would change the *status quo*, rather than preserve it.

11. Palmer opposed KMIR-TV's request for temporary relief on June 11, 1982. Initially Palmer contends that this request should be dismissed as unauthorized, since it merely restates KMIR-TV's earlier arguments. In any event, maintains Palmer, KMIR-TV's arguments in support of its request for temporary relief have already been rejected by the Commission and rebutted by Palmer. The only new evidence offered by KMIR-TV, states Palmer, is the notification of the actual loss of nonduplication protection. This, Palmer argues, does not however, constitute evidence of economic harm or adverse impact on service to the public. KMIR-TV's arguments concerning adverse impact are unsubstantiated generalizations according to Palmer, and do not warrant the relief requested, citing, *inter alia, KDUB-TV, Inc., supra.*[10]

12. On July 20, 1982, the Chief of the Cable Television Bureau sent a letter to KMIR-TV, suggesting that the station submit complete financial data, including FCC Forms 324, for several fiscal periods, to enable the Commission's staff to analyze financial trends and cash flow, citing, *inter alia, Virginia Broadcasting Corporation* (Charlottesville, Virginia), FCC 82–192, 89 FCC 2d 1152 (1982), and *KDUB-TV, Inc., supra.*

13. KMIR-TV responded to the Bureau Chief's letter on August 13, 1982, stating that most of the information requested had already been submitted. Nevertheless, KMIR-TV filed some further financial data through the end of its most recent fiscal year (January 31, 1982), including a copy of KMIR-TV's 1982 IRS return. KMIR-TV claims that anlaysis of cash flow for a station in KMIR-TV's situation is not valid, given the

---

[10] Group W filed comments on KMIR-TV's request on June 11, 1982, again noting that KMIR-TV does not seek relief against Group W's system. *See* note 1, *supra*. KMIR-TV confirms this.

subsidies KMIR-TV receives from its principals. KMIR-TV summarizes financial data already submitted, and again contends that nonduplication protection is necessary to avoid a loss of service to the public.

14. On August 26, 1982, KMIR-TV filed a supplement to its petitions, joined in by KESQ-TV. In this supplement, KMIR-TV submits Arbitron data from July 7–August 3, 1982, reflecting actual viewing in Palm Springs following KMIR-TV's loss of nonduplication protection. KMIR-TV argues that this loss has had a direct effect on it, causing its sign-on to sign-off share to drop from 15 to 6, while that of KNBC-TV rose from 7 to 15. KMIR-TV also notes that its prime time share dropped from 23 to 7, while KNBC-TV's rose from 2 to 14.[11] Accordingly, KMIR-TV requests swift grant of its petitions.

15. Warner opposed KMIR-TV's August 1982 filings on September 9, 1982. Initially, Warner challenges KESQ-TV's standing in this proceeding, citing *Desert Empire Television Corporation*, 86 FCC 2d at 644 n. 1. Warner next contends that KMIR-TV's objections to a cash flow analysis are unorthodox and contrived, and argues that KMIR-TV's cash flow has generally been positive. Based on KMIR-TV's data, Warner states that the station's cash flow has been as follows: 1978 = $168,459; 1979 = −$31,999; 1980 = $82,035; 1981 = $33,577. Warner notes that KMIR-TV submits no data on advertising revenues, and asserts that the station's showing is insufficient, citing *Northern New England Television, supra.* Turning to the Arbitron data submitted, Warner contends that KMIR-TV is losing audience generally across the broadcast day, in part to Television Broadcast Station KTLA (Ind., Channel 5), Los Angeles, California, ". . . a strong indication that other unknown factors are playing a role." (footnote omitted). Warner additionally argues that KMIR-TV's audience has historically shown ". . . frequent and substantial . . . fluctuations," and that therefore analysis from a single share period after the loss of nonduplication protection is unreliable.[12]

16. KMIR-TV replied to Warner on September 14, 1982. KMIR-TV contends that the July 1982 Aribtron data are conclusive, and not attributable to statistical fluctuations. KMIR-TV argues that it is not losing audience throughout the day, but is in fact gaining audience in non-network dayparts, while it is losing up to 76% of its audience in network dayparts. KMIR-TV asserts that general network audience losses due to lack of popularity are not germane to this analysis, and argues that KNBC-TV has increased its share of the NBC viewing audience from between 7% to 40% in May 1982 to between 70% and 72% in July 1982. KMIR-TV claims that Warner's audience-data analysis is incomplete, and notes that Warner presents no overall sign-on to sign-off analysis for

[11] KMIR-TV submits similar data for KESQ-TV.

[12] On September 21, 1982, Palmer filed an "Opposition" supporting Warner's.

either KESQ-TV or KMIR-TV. KMIR-TV again argues that a cash flow analysis is not appropriate in KMIR-TV's situation, and contends that the station submitted information on revenues attributable to network programming with its "Petition for Reconsideration."

17. Warner supplemented its latest opposition on September 21, 1982, reiterating its opposition to KESQ-TV's participation in this proceeding. Warner contends that Arbitron data support its arguments, asserting that ". . . KMIR-TV lost 3 percent of its audience share in the 3 p.m.–6 p.m. *non-network* programming time period." (footnote omitted). Warner reiterates its earlier arguments, and submits Arbitron survey data and a summary analysis of the data to buttress its arguments. Warner maintains that KMIR-TV's audience share has been historically unstable, fluctuating by as much as 10 percent in certain time periods between surveys. Citing *Virginia Broadcasting Corporation, supra,* Warner argues that KMIR-TV has not shown a causal relationship between the elimination of nonduplication protection and the most recent audience share fluctuations.

*Discussion*

18. We have consistently held that "the only valid grounds for rehearing are manifest error or omission so material that the corrections would result in substantial alteration of the original decision. Correspondingly, rehearing generally is not available for the purpose of rearguing matters on which there has been deliberation and decision. . . ." *Empire State Cable TV Co., Inc.* (Binghamton, New York), FCC 67–1138, 10 FCC 2d 341, 342 (1967).[13] Consequently, insofar as KMIR-TV merely reiterates its prior argument that KNBC-TV is not significantly viewed in Riverside Central, or that prior surveys were inaccurate, its petition will be denied.[14] At the same time, Warner's citation of *Docket No. 21284, supra,* is not entirely germane. At issue therein was the question of impact from the importation of distant signals, and not from duplicating network

---

[13] *See also KDUB-TV, Inc.*, 89 FCC 2d at 998; *Waterbury Community Antenna, Inc., et al.*, FCC 81–133, 85 FCC 2d 1049, 1052 (1981); *Petitions for Reconsideration of Commission's Action*, FCC 80–101, 77 FCC 2d 54, 55 (1980); *WWIZ, Inc.* (Lorain, Ohio), 37 FCC 685, 686 (1964).

[14] We note that KMIR-TV's claimed inability to perform a meaningful analysis of KNBC-TV's viewing levels due to high cable penetration in the Palm Springs ADI is drawn into question by July 1982 Arbitron data which show this penetration to be 86.5%, as well as by KMIR-TV's August 26, 1982 submission. With respect to KMIR-TV's argument that Arbitron's audience survey data have suffered from erroneous information, we note that the April 1, 1981 letter from Arbitron submitted by KMIR-TV (*see* paragraph 3, *supra*) states that Arbitron would recontact the homes in question in future surveys. Nevertheless, Arbitron's February 1982 data show the same prime time share for KNBC-TV (a share of 5) as had been recorded by Arbitron the previous February, prior to the new verification procedures. Accordingly, even during a period of nonduplication protection, KNBC-TV is being viewed off-air in the Palm Springs ADI.

programming. In fact, the existence of network program nonduplication protection was assumed by this study.[15]

19. Nevertheless, an analysis of the most recent Arbitron viewing data for Palm Springs begins to indicate that circumstances may now have changed. In June 1982, the cable systems involved in this proceeding ended their voluntary nonduplication protection of KMIR-TV. Arbitron data for the years 1979–1982 show the following for KMIR-TV:

*KMIR-TV Palm Springs ADI 9 AM-Midnight Audience Share*

| 2/77 | 2/78 | 2/79 | 2/80 | 2/81 | 2/82 | 5/82 | 7/82 |
|---|---|---|---|---|---|---|---|
| 20 | 19 | 18 | 16 | 19 | 14 | 15 | 6 |

While KMIR-TV's audience remained relatively stable between 1977 and 1981, showing a small drop in early 1982, its audience dropped significantly between May and July 1982. It is during this period that Warner and Palmer terminated the voluntary nonduplication protection they had been giving KMIR-TV. By comparison, KMIR-TV's July 1981 9 AM-Midnight audience share was 13.[16] If this audience loss is to be traced to a loss of nonduplication protection, KMIR-TV's losses should result in equivalent gains for KNBC-TV. Between November 1981 and May 1982,[17] KNBC-TV's sign-on to sign-off and 9 AM-Midnight audience shares remained stable at 7–8, while its prime time audience shares ranged from 2 to 5. In July 1982, however, KNBC-TV's sign-on to sign-off audience share rose to 15, while its 9 AM-Midnight and prime time audience shares rose to 14. In view of this apparent audience shift, as many non-overlapping dayparts as are available are examined, in order better to ascertain the true effect of Section 76.92(g) of the Rules on KMIR-TV's audience. *See KDUB-TV, Inc.*, 88 FCC 2d at 459–460. The results are as follows:

---

[15] We also note at this time that it is KMIR-TV's audience which is the focus of the pertinent inquiry herein, not KESQ-TV's, which has not itself established an interest in this matter, but has merely attempted to bootstrap itself onto KMIR-TV's petition. While KESQ-TV submitted a limited analysis of ABC network audience data for itself and for KABC-TV, the data submitted are incomplete, *see KDUB-TV, Inc., supra*, and no financial data are submitted. Accordingly, we do not find the submitted data on KESQ-TV germane to this analysis, nor do we find that KESQ-TV has made the full and independent showing necessary for relief. *Compare Desert Empire Television Corporation*, 86 FCC 2d at 644 n. 1, *with Scranton Broadcasters, Inc. and WBRE-TV, Inc.*, FCC 82–58, 88 FCC 2d 1482 (1982).

[16] KMIR-TV's sign-on to sign-off audience dropped from 15 to 6 between May and July 1982, while its prime time audience dropped from 23 to 7 in that same period. By comparison, KMIR-TV's July 1981 shares were 14 and 19, respectively.

[17] July 1981 data are not available for KNBC-TV.

Differences Between July 1981
and July 1982 ADI Shares
(July 1982 minus July 1981)

| *Daypart*[18] | *Difference* |
|---|---|
| Mon.–Fri. 7–9 AM | −16 |
| 9 AM–Noon | −11 |
| Noon–4:30 PM | −7 |
| 4:30–6 PM | +1 |
| 6–7:30 PM | −1 |
| 7:30–8 PM | +7 |
| 8–11 PM | −12 |
| 11–11:30 PM | +1 |
| 11:30 PM–1 AM | −34 |
| Sat. 7 AM–Noon | −5 |
| Sat. & Sun. 1–5 PM | −4 |
| 11–11:30 PM | 0 |
| Prime Time | |
| (Mon.–Sat. 8–11 PM, Sun. 7–11 PM) | −12 |
| All Day | |
| Sun.–Sat. 9 AM-Midnight | −7 |
| Sun.–Sat. Sign/on-Sign/off | −8 |

It is highly significant that KMIR-TV is losing audience nearly throughout its broadcast day, except for three dayparts Monday-Friday in which non-network programming or local news is broadcast. We note

---

[18] The programming carried in these dayparts, based on May 1982 schedules (July 1982 schedules are not yet available), is as follows:

| *Daypart* | *Program Type* |
|---|---|
| Mon.–Fri. 7–9 AM | network |
| 9 AM–Noon | network |
| Noon–4:30 PM | network Noon–3:30 PM<br>non-network 3:30–4:30 PM |
| 4:30–6 PM | non-network |
| 6–7:30 PM | local news 6–6:30 PM<br>non-network 6:30–7 PM<br>network 7–7:30 PM |
| 7:30–8 PM | non-network |
| 8–11 PM | network |
| 11–11:30 PM | local news |
| 11:30–1 AM | network |
| Sat. 7 AM–Noon | network |
| Sat. & Sun. 1–5 PM | network Sat. 1–2:30 PM<br>Sun. 3:30–5 PM<br>non-network Sat. 2:30 PM–5<br>Sun. 1–3:30 PM |
| 11–11:30 PM | non-network |
| Prime Time | network |

particularly that KMIR-TV has made some modest gains in its local news broadcasts' audience shares, the sole instances of locally-oriented programming offered by KMIR-TV.[19] The equivalent loss of audience by KMIR-TV and gain by KNBC-TV during duplicating periods compared with the health or growth of the local station at other times is precisely the correlation the Commission is looking for in order to determine whether Section 76.92(g) is having an adverse impact. *See KDUB-TV, Inc., supra.* The foregoing leads us to conclude that the loss of nonduplication protection has had a substantial negative impact on KMIR-TV's audience.

20. In order to determine what relief, if any, is warranted, we next assess KMIR-TV's financial condition to see how these changes in audience are related to its ability to attract revenues, and what this will mean to its overall financial health. "If these audience shifts appear to cause real harm (not just some loss of revenue or profit), and if there is evidence that this in turn will affect the station's ability to provide public service, especially on the local level, then some form of special relief should be granted." *KDUB-TV, Inc.*, 88 FCC 2d at 461. While KMIR-TV does not submit all the financial information which the Commission has required in previous cases, it is clear from the foregoing that even with extended nonduplication protection, KMIR-TV has been unable to increase its audience, and has experienced an erratic financial history at best. In addition, the evident effect of Section 76.92(g) of the Rules on KMIR-TV has been much more immediate and pronounced than that which the Commission found in *KDUB-TV, Inc. supra.* This must negatively impact KMIR-TV's financial state, and its ability to serve the public interest. Accordingly, while we cannot conclude that permanent relief is warranted, *see id.* at 462, in view of our analysis herein, and balancing the equities involved, we will grant KMIR-TV a temporary waiver of Section 76.92(g) of the Rules, limited to Palmer's and Warner's cable systems, for a period of only eighteeen (18) months from the release date of this opinion. Should KMIR-TV desire an extension of this waiver, it is directed to file any such request within twelve (12) months from the release date of this opinion, together with full financial disclosure, and any other documentation KMIR-TV wishes to submit to justify any such continuation.

21. We wish to emphasize that our result herein flows specifically from the unique facts of the instant case. KMIR-TV previously sought relief and did not succeed, and even today the facts militate against granting the full relief which the station seeks. Palm Springs, California, is an extremely small market, ranked 188th by Arbitron, and is over 86% pene-

[19] Although Palmer notes, in its June 11, 1982, pleading, a local KMIR-TV program entitled "Town Talk," aired weekdays at 6:30 PM, Arbitron data indicate that this program was dropped sometime between February and November 1980.

trated by cable. *See* note 14, *supra*. We regard it as unlikely that the facts underlying our action today will frequently be duplicated elsewhere in the country. We reiterate that the waiver granted KMIR-TV today is only temporary, and that the station will have to present persuasive evidence to justify any extension. Finally, turning to KMIR-TV's request for temporary relief, in view of our action herein today, this petition will be dismissed as moot.

In view of the foregoing, we find that grant of KMIR-TV's petition, to the extent indicated above, is in the public interest.

Accordingly, IT IS ORDERED, That the "Reply to Oppositions to Emergency Petition for Temporary Relief" filed June 18, 1982 by Desert Empire Television Corporation IS DISMISSED.

IT IS FURTHER ORDERED, That the "Emergency Petition for Temporary Relief" filed May 28, 1982, by Desert Empire Television Corporation IS DISMISSED as moot.

IT IS FURTHER ORDERED, That the "Motion for Acceptance of Reply Three Pages in Excess of Page Limit" filed August 14, 1981, by Desert Empire Television Corporation IS GRANTED.

IT IS FURTHER ORDERED, That the "Petition for Reconsideration" filed June 8, 1981, by Desert Empire Television Corporation IS GRANTED to the extent indicated in paragraph 20, *supra*, and in all other respects IS DENIED.

IT IS FURTHER ORDERED, That Palmer Communications, Inc. d/b/a Coachella Valley Television and Warner Amex Cable Communications, Inc. SHALL PROVIDE network program nonduplication protection to Desert Empire Television Corporation against the signal of Station KNBC-TV no later than thirty (30) days following service of this order.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico *Secretary*

October 29, 1982

DISSENTING STATEMENT

OF

COMMISSIONER ANNE P. JONES

IN RE: "PETITION FOR RECONSIDERATION" (CSR–1340) FILED JUNE 8, 1981, BY DESERT EMPIRE TELEVISION CORPORATION, LICENSEE OF STATION KMIR-TV (NBC, CHANNEL 36), PALM SPRINGS, CALIFORNIA.

In my view there is even less justification for protecting this station against cable competition than there was in the *KDUB-TV* case decided last year. (*KDUB-TV, Inc.*, 88 F.C.C. 2d 450). I therefore dissent here for the same reasons I gave for doing so in that case.

Reconsideration, Petition for, Denial of

Reconsideration of Decision, 91 FCC 2d 98, denied where petitioner merely repeated or expanded upon arguments already made in his exceptions and considered in the Board's Decision. No new public interest considerations were raised.
—*Donald E. Gilbeau*
PR Docket No. 81–172

FCC 81R–61

**BEFORE THE**

# FEDERAL COMMUNICATIONS COMMISSION

**WASHINGTON, D.C. 20554**

| | |
|---|---|
| In the Matter of Revocation of License of | |
| DONALD E. GILBEAU<br>645 North Argonaut Street<br>Stockton, California 95203 | PR DOCKET<br>NO. 81–172 |
| Licensee of Station N60Z in the Amateur Radio Service | |
| Suspension of License of | |
| DONALD E. GILBEAU<br>645 North Argonaut Street<br>Stockton, California 95203 | PR DOCKET<br>NO. 81–173 |
| Amateur Extra Class<br>Radio Operator License | |
| To: Review Board | |

MEMORANDUM OPINION AND ORDER

Adopted: October 5, 1982; Released: October 7, 1982

BY THE REVIEW BOARD:

1. In a Decision released August 17, 1982, the Review Board revoked Donald E. Gilbeau's Amateur radio station license and suspended for

term his Amateur operator's license based on a finding of willful interference with radio communications. Because of mitigating circumstances, the revocation was expressly without prejudice to Gilbeau's refiling of an application after the requisite one year waiting period following revocation (Section 1.916 of the Rules, 47 CFR 1.916). Now before the Board is a petition for reconsideration of our Decision, filed September 13, 1982, by Gilbeau, and an opposition filed by the Private Radio Bureau on September 24, 1982.

2. The Board will deny the petition for reconsideration. Gilbeau's pleading largely repeats or expands upon arguments previously made in his exceptions and considered in our Decision. It is well settled that reconsideration will not be granted merely to rehash matters already treated and resolved. *WWIZ, Inc.*, 37 FCC 2d 685 (1964), *aff'd sub nom. Lorain Journal Co.* v. *FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); *Central Alabama Broadcasters, Inc.*, 89 FCC 2d 1029, released April 22, 1982. No new public interest considerations have been raised by Gilbeau which warrant further treatment.

3. ACCORDINGLY, IT IS ORDERED, That the petition for reconsideration filed by Donald E. Gilbeau on September 13, 1982 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
*Member,* Review Board

Certification of Questions
Female Ownership-Participation, Comparative Credit for
Minority Ownership, Factor in Comparative Hearing
Review Board, Jurisdiction of

Review Board certified to Commission a comparative broadcast case that turns on novel policy question of which of two 100% integrated applicants is to be preferred: one with 15% minority paticipation enhancement credit or other with 100% female participation enhancement credit.

—*Horne Industries, Inc.*
BC Docket No. 81–551

FCC 82R–68

**BEFORE THE**

# FEDERAL COMMUNICATIONS COMMISSION

**ASHINGTON, D.C. 20554**

| | |
|---|---|
| In re Applications of | |
| HORNE INDUSTRIES, INC.<br>Russellville, Arkansas | BC DOCKET<br>NO. 81–551<br>File No.<br>BPH–11185 |
| RIVER VALLEY BROADCASTING, INC.<br>Russellville, Arkansas | BC DOCKET<br>NO. 81–552<br>File No.<br>BPH–800711AJ |
| JUDY K. PURTLE<br>Russellville, Arkansas | BC DOCKET<br>NO. 81–553<br>File No.<br>BPH–800807AE |
| For Construction Permit | |

MEMORANDUM OPINION AND ORDER

Adopted: November 22, 1982; Released: November 26, 1982

BY THE REVIEW BOARD:

1. Over the last two decades the Review Board's authority has been considerably expanded; however, the Board has never been authorized to make "new policy or change old policy." *See Charles County Broadcasting Co.*, 25 RR 903, 907 (1963). After reviewing the written and oral arguments in this comparative case the Board has unanimously concluded that a strong probability exists that a comparative choice turns on a narrow but "novel issue of law or policy" which the Commission has never had an opportunity to address. We therefore certify the case to the Commission for the reasons discussed below. See 47 CFR 0.363, para. 9 below.

2. *Background:* Three competing applications propose to establish a new FM station in Russellville, Arkansas, but only one can be granted. The record and the Initial Decision of Administrative Law Judge Miller, FCC 82D–32, released April 28, 1982, reveal that a close comparative choice must be made between two of the applicants, Judy K. Purtle and River Valley. The third applicant, Horne Industries, acknowledges that its exceptions are not designed to secure a grant; rather they are designed to set the record straight on two nondecisional points. (Tr. 473).

3. River Valley is entitled to a slight preference for its auxiliary power proposal, I.D., Conclusions, para. 22; the choice between Purtle and River Valley ultimately turns on the factor of integration of ownership with management. On this factor both applicants are entitled to 100% full-time quantitative integration. I.D., Findings, paras. 10–11, 15–16, 22–23. Both proposals are enhanced by local residence and civic participation. *Ibid.* Although Purtle was awarded considerable enhancement by the ALJ because of her broadcast experience, I.D., Conclusions, para. 9, this factor, like River Valley's preference for auxiliary power, is entitled to minor weight under the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 5 RR 2d 1901 (1965). These two factors are of dubious decisional significance when considered with the issues of minority and female enhancement credits discussed below.

4. In essence, this case turns on the relative weight to be accorded Purtle's enhancement credit for 100% female participation as General Manager in comparison with River Valley's minority enhancement credit for fully integrating Almer Jackson, a Black male, Vice-President, and 15% stockholder, in the operation of the station. I.D., Findings, paras. 15, Conclusions, para. 23. In his Initial Decision, the ALJ granted the application of Judy K. Purtle.

5. River Valley argues that "the ALJ's conclusion is at odds with FCC policy." (Br. 19). Purtle should not have been awarded substantial enhancement for female participation while River Valley should have received *decisive* credit for Jackson's minority participation. In support of its policy argument River Valley relies on the *Statement of Policy on Minority*

*Ownership of Broadcast Facilities*, 69 FCC 2d 1591, 1953 n. 9 (1978), where the Commission stated: "we have not concluded that the historical and contemporary disadvantagement suffered by women is of the same order, or has the same contemporary consequences, which would justify inclusion of a mijaority of the nation's population in a preferential category defined by the presence of 'minority groups.'" It also quotes language from *Mid-Florida Television Corp.*, 69 FCC 2d 607, 652 (Rev. Bd. 1978), but that Board decision was subsequently vacated by the Commission. *See Mid Florida Television Corp.*, 87 FCC 2d 203 (1981). River Valley also relies on two other Board decisions for the following propositions: (1) *Radio Gaithersburg, Inc.*, 72 FCC 2d 820, 829 (Rev. Bd. 1979): "the credit awarded for female participation is less than that accorded black participation;" and (2) *Alexander S. Klein, Jr.*, 69 FCC 2d 2134, 2147 n. 26 (Rev. Bd. 1978): "Female ownership and participation warrants only a slight merit . . . less significant than black ownership and participation." River Valley emphasizes the fact that *Klein* was affirmed by the full Commission, 86 FCC 2d 423 (1981), which awarded a grant to "a 5% black stockholder (whose shares were a gift from the white 95% stockholder) . . ." (Br. 21–22).

6. Purtle's reply did not respond to its opponent's policy arguments; instead she relied on the ALJ's conclusion that Jackson's integration credit should be considered "poor" because he allegedly lacked candor "about his academic credentials" (Br. 18), and because of his "extreme unstable employment history" (Br. 18–19). Purtle also renewed the argument that River Valley should receive no credit for Mr. Jackson, "a token Black" (Br. 20), but this contention had been rejected by the ALJ. (I.D., Conclusions, para. 16).

7. At the beginning of the oral argument on September 16, 1982, the parties were asked to address "the question of why the Board should not certify this case forthwith to the Commission if it finds that the case comes down to the novel policy question of whether female or minority is to be preferred . . ." Tr. 453–454. Counsel for Horne agreed that the case should be certified because "there is no Commission precedent . . ." (Tr. 475) but counsel for Purtle (Tr. 493) and River Valley (Tr. 495) did not agree.

8. During oral argument the parties were also encouraged to try to resolve their dispute by negotiations and possible merger. (Tr. 496). Their attempts proved unsuccessful and resulted in the filing of a series of letters which we will strike from the record, para. 13 below, because they are inadmissible. *See* Rule 408 of the Federal Rules of Evidence, which reflects public policy favoring confidentiality of discussions to encourage negotiations and settlements. *See also Thornell Barnes Co.*, 1 FCC 2d 1247, 1283–4 (Rev. Bd. 1965) (Statement by Board Member Nelson).

*Discussion*

9. In 1961 Congress in an effort to expedite and improve the administrative process enacted legislation authorizing the FCC to create a Review Board. Public Law 87–192, 75 Stat. 420, 47 U.S.C. 155(d). Its primary purpose was to expedite the hearing process by permitting the Commission to delegate the function of reviewing initial decisions to an employee board, theeby allowing the Commissioners to devote more of their time to policy, planning and issues of general communications importance. Sen. Rep. No. 576, 87th Cong. 1st Sess. In 1962, the Commission adopted rules establishing a Review Board, and thereafter from time to time the Board's jurisdiction has been expanded. *See e.g., Report and Order* FCC 62–612, 62–613, released June 11, 1962; *Amendment of Part 0 & 1*, 88 FCC 2d 377 (1981). Only a year ago the Board's jurisdiction was considerably changed and modernized; however, the rules continue to contain the following provisions for certification of matters to the Commission:

> (a) The Review Board, on its own motion or upon motion to the Board by any party, may in its discretion certify any matter to the Commission with a request that the Commission act upon the matter. The Commission may act upon the matter or remand it to the Board for decision.
>
> (b) Whenever the Commission determines that a matter pending before the Board involves a *novel issue of law or policy*, it may, on its motion, direct that the matter before the Board be certified to the Commission for decision. However, no petition requesting the Commission to take such action will be entertained. (Emphasis added) Section 0.363, reproduced at 88 FCC 2d 379.

10. The Commission's Rules, quoted above, past precedent *Charles County Broadcasting Co., supra*, and comments by legal scholars all establish that it has never been the Board's function to resolve novel legal or policy questions. One author has pointed out that the Commission has conceived:

> the function of a Review Board as primarily deciding appeals from initial decisions of [ALJ's] in adjudicative cases *as nearly as possible on the basis of precedent and formal statements of agency policy. The Board is expected to apply existing law rather than to make new policy*, although of necessity it "may consider the extension of present policies to include new factual situations." *When policy issues of first impression arise, the Board is expected to certify them to the members of the agency for decision.* The judicial model posits the Board's function in deciding questions of law as analogous to that of a lower court subject to review by an appellate tribunal. (Emphasis added)

Freedman, *Review Boards in the Administrative Process*, 117 U. of Pennsylvania L.R. 546, 559 (1969).

11. After due deliberation, the Board has concluded that this case presents a policy question of first impression. In the words of counsel for Horne Industries "there is no Commission precedent," para. 7 above, to guide us in deciding what merit should be awarded for 100% female

ownership when compared with 15% minority ownership. River Valley points to a footnote in the *Statement of Policy on Minority Ownership, supra*, which suggests that, at that time, the Commission was not prepared to include women "in a preferential category defined by the presence of 'minority groups.'" See para. 5 above. That abstract statement does not furnish sufficient guidance in resolving this concrete case. River Valley also relies on the Commission's decision in *Klein*, para. 5 above. There merit was awarded for a 5% stockholder who was both female and Black. Similarly, the Commission's recent decision in *Gilbert Broadcasting Corp.*, 91 FCC 2d 450, 52 RR 2d 429 (1982), at para. 58, involved an applicant which was controlled both "by minorities and women." These precedents simply do not furnish any guidance in choosing between female and minority ownership. Thus, this case will be certified to the Commission pursuant to Section 0.363(a). Absent some guidance from the Commission, we believe that we would exceed our function in deciding what we perceive to be a sensitive policy question.[1]

12. ACCORDINGLY, IT IS ORDERED, That this proceeding IS CERTIFIED to the Commission for its consideration pursuant to Section 0.363(a) of the Rules, 47 CFR 0.363(a); and

13. IT IS FURTHER ORDERED, That the letters filed October 4 and 8, 1982 on behalf of River Valley Broadcasting Company, Inc. and the letter filed October 6, 1982 on behalf of Judy K. Purtle ARE STRICKEN; and

14. IT IS FURTHER ORDERED, That the unopposed Petition for Leave to Amend file on June 22, 1982 by Judy K. Purtle IS GRANTED for good cause shown, and the amendment IS ACCEPTED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
*Chairman*, Review Board

[1] Since October 1, 1981, the Board has taken more than sixty major actions. This is the first time it has had to certify a case because of a novel policy question.

FCC 82D–32

**BEFORE THE**

# FEDERAL COMMUNICATIONS COMMISSION

**WASHINGTON, D.C. 20554**

| | |
|---|---|
| In re Applications of | |
| HORNE INDUSTRIES, INC.<br>Russellville, Arkansas | BC DOCKET<br>NO. 81–551<br>File No.<br>BPH–11185 |
| RIVER VALLEY BROADCASTING, INC.<br>Russellville, Arkansas | BC DOCKET<br>NO. 81–552<br>File No.<br>BPH–800711AJ |
| JUDY K. PURTLE<br>Russellville, Arkansas | BC DOCKET<br>NO. 81–553<br>File No.<br>BPH–800807AE |
| For Construction Permit | |

*Appearances*

*Eugene T. Smith* on behalf of Horne Industries, Inc.; *J. Dominic Monahan* and *Michael Pace* on behalf of River Valley Broadcasting, Inc.; *Kathryn R. Schmeltzer* and *Martin R. Leader* on behalf of Judy K. Purtle; and *Allan Moskowitz* on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE
WALTER C. MILLER

Issued: April 23, 1982; Released: April 28, 1982

*Preliminary Statement*

1. Three mutually-exclusive applicants seek authority to operate a new FM broadcast station at Russellville, Arkansas, on Channel 265A (100.9

MHz). They are: Horne Industries, Inc. (Horne), River Valley Broadcasting, Inc. (River Valley), and Judy K. Purtle (Purtle).

2. The only factual issue that needs to be resolved is the standard comparative issue. See 46 FR 43301 published August 27, 1981, Issue 1. The prehearing conference was held October 21, 1981. The parties held hearing sessions on February 2 and 3, 1982, and a rebuttal session on February 8, 1982. The record was closed that day.

3. Horne, River Valley, and Purtle each filed their Proposed Findings of Fact and Conclusions of Law on March 12, 1982. River Valley and Purtle filed Reply Findings on March 26, 1982.

## *Findings of Fact*

### *Issue 1—The Standard Comparative Issue*

4. *Description of Applicants—Horne.* Horne is an Arkansas Corporation that was formed in 1969. Although it is authorized to issue up to 500,000 shares of stock, only 17,385 shares have been issued. The following Chart sets out the details on Horne's three officers, directors and/or stockholders:

Horne

| *Person* | *Office* | *Director* | *Shares and % Ownership* |
|---|---|---|---|
| Michael Horne | President | Yes | 17,385 (100%) |
| Alpha P. Horne | Sec./Treas. | Yes | 0 (0%) |
| Richard Williams | Asst. Sec. | No | 0 (0%) |

5. *River Valley Broadcasting, Inc.* River Valley is an Arkansas Corporation. The following chart gives the details on the individuals it claims are its officers, directors and/or stockholders:[1]

River Valley

| *Person* | *Office* | *Director* | *Shares and % Ownership* |
|---|---|---|---|
| Jerry Canerday | President | Yes | 850 (85%) |
| Almer Jackson | Vice President. | Yes | 150 (15%) |
| Nancy Canerday | Sec./Treas. | Yes | 0 (0%) |

[1] Purtle has questioned the viability of Almer Jackson's 15% stock ownership and his officer's and director's roles in the River Valley Corporation. This question will be considered further *infra.*, when the integration-of-ownership-with-management criterion is evaluated. At this juncture it is sufficient to note tha Jackson will eventually contribute $15,000 for his 15% stock interest; that the First National Bank of Russellville will supply that $15,000; but that Jerry Canerday is going security for Jackson's $15,000 as well as his own $85,000 initial contribution. See Purtle Ex. 2; and Tr. 113–119.

6. *Judy K. Purtle.* Judy K. Purtle is the 100% sole proprietor of applicant Judy K. Purtle.

7. *Diversification of Mass Media.* Neither River Valley nor any of its principals have any broadcast or other mass media ownership interests. The same is true for Purtle.[2] However, Horne is the licensee of Station KARV (AM), Russellville, Arkansas. In addition, and for the purposes of this proceeding, Michael Horne is an officer, director, and controlling stockholder in the licensee corporations of Station KIKZ, Seminole, Texas; KOYY (AM) and (FM), El Dorado, Kansas; and KWCK-AM and KSER-FM, Searcy, Arkansas. Michael Horne presently works full-time at KARV (AM), Russellville.

8. *Integration of Ownership With Management—Horne.* Horne proposes no (0%) integration of ownership into the day-to-day operation of its station.

9. *River Valley.* River Valley proposes to integrate both of its stockholders into its day-to-day operation. Consequently it seeks 100% integration credit.

10. *River Valley—Jerry Canerday.* River Valley will fully integrate its President, and 85% stockholder, Jerry Canerday, into its daily operation. Canerday will serve as full-time Station Manager. He will devote a minimum of 40 hours a week to station affairs (River Valley Ex. 3; Tr. 134). As Station Manager, Canerday will direct all aspects of station operation; i.e., sales, programming, promotion, and engineering. All station personnel will report to him. He will establish the station's policies and practices.

11. Jerry Canerday was born in Russellville, Arkansas in 1940. He graduated from Russellville High School in 1958. He then spent two semesters at Arkansas Tech in Russellville studying forestry. He presently resides in Dardanelle, Arkansas—a community about 5 miles from Russellville and has lived there since 1973.

12. In 1959 he went to work for the State of Arkansas' engineering and construction division. After five years he became a bridge inspector. From 1966–1973 he resided in Pine Bluff, Arkansas, and worked as a cost accountant, a construction supervisor, and a field sales representative. In 1973, he came back to Russellville, and opened his own business—the A–1 Exhaust Muffler Shop. He is President and 100% owner of that business.[3] He intends to turn the muffler shop business over to his son-in-law and his (Canerday's) wife if he gets a grant here. Canerday also has a ranch with 10–21 head of cattle which he raises for sale. (Tr. 101–102).

---

[2] Judy K. Purtle presently works for Station KCAB (AM) and KWKK (FM) Dardanelle, Arkansas. If her FM application here is granted, she will terminate her employment with those stations.

[3] As an investment, Canerday opened a second muffler shop in Muskogee, Oklahoma in 1975. He sold that business in 1977.

13. Canerday has no prior broadcast experience. But he has had some experience selling advertising for print media (Tr. 111; 141).

14. Canerday is active in the Grace Baptist Church in Russellville as President of his Sunday School Class, Chairman of the Ushers and Coach of the women's softball team. He has been a member of the Russellville Chamber of Commerce since 1977 and an officer in the Dardanelle Lions Club since 1981.

15. *River Valley—Almer Jackson.* River Valley will fully integrate its Vice-President[4] and 15% stockholder, Almer Jackson, into its day-to-day operation. Jackson will serve as full-time Operations Manager with special responsibility for programming and news. He will devote a minimum of 40 hours per week to station operations.

16. Almer Jackson was born in Little Rock, Arkansas on April 18, 1951. But he grew up in Russellville. And, except for about a year and a half of his life, he has been a Russellville resident. He graduated from Russellville High School in 1969.

17. Jackson also claimed to have an advanced education. On direct examination Jackson swore: that he had received two academic scholarships which had enabled him to attend Arkansas Tech University in Russellville from 1973 to 1976; that in 1976 he transferred briefly to the University of Arkansas; and that, in 1979, having returned to Arkansas Tech he received a Bachelor of Arts degree in Sociology from that University[5] (River Valley Ex. 5, p. 1; Tr. 162).

18. However, during the course of the hearing, it developed that Jackson's sworn testimony was false; that he had attended Arkansas Tech on four separate occasions starting back in 1970 (August 22, 1970 to December 22, 1970; August 27, 1973 to May 17, 1974; September 3, 1974 to December 17, 1976; and August 24, 1978 to July 6, 1979); and that he has never received a degree from that institution[6] (Purtle Ex. 5; Tr. 447).

19. After leaving Arkansas Tech between July 1979, and February 1981, Jackson held not less than six different jobs (River Valley Ex. 5, p. 2; Tr.

---

[4] Neither Canerday nor Jackson know how or when Jackson became River Valley's Vice-President or a Corporate Director (Tr. 111–112, 180, 184). The record reflects that the only reason Jackson has been included in the River Valley operation is because Canerday needed minority enhancement and Jackson is a Black male (Tr. 104–108, 176–180).

[5] Jackson even went so far as to assert (without any record support) that there are no job opportunities for Black college graduates in Russellville (Tr. 196).

[6] "No one can frequent our courts of justice for any length of time without finding himself aghast at the daily spectacle presented by seemingly honest and intelligent men and women who array themselves upon opposite sides of a case and testify under oath to what appear to be absolutely contradictory statements of fact." *The Art of Cross Examination*, Fourth Edition, Revised and Enlarged, Chapter VIII, page 142, by Francis Wellman.

162–177).[7] [8] He worked as a counselor for the West Arkansas Division of Human Services; he did free lance photography for the River Valley Shopper—a local free newspaper; he worked for the Arkansas State Employment Security Division; he was a salesman and office sales manager for Checkmate Electronics; he is a certified professional model and fashion photographer; and he was in business for himself as the owner of "The Image Agency"—an entertainment, promotional choreographic production and photographic venture in Little Rock. Jackson currently does photographic work for Cole-Taylor-Trumble (River Valley Ex. 5; Tr. 159, 161–166, 172).[9]

20. Since October 1981, Jackson has been a licensed Baptist minister and he has worked as an unsalaried assistant pastor of Pilgrim Rest Baptist Church in Russelville. He has been the Church's Sunday School Superintendant for twelve years, a Sunday School Secretary for six years, and a Deacon for eight years (River Valley Ex. 5, p. 2).

21. Jackson has no prior broadcast experience (Tr. 111). And even though he will have special responsibility for programming (see Finding 15 *supra.*) he didn't participate in the formulation of River Valley's proposed programming and wasn't familiar with its public affairs proposal. In fact he has never met the woman who was to be the proposed office manager.

22. *Judy K. Purtle.* Judy Purtle is an individual applicant. A female, and 100% owner, she will be integrated full-time into her proposed station's day-to-day operation. Consequently, she seeks 100% integration credit.

23. Purtle will be the station's General Manager. She will devote at least 40 hours per week to station operations. She will manage the station's day-to-day affairs; she'll plan the program schedule, determine and administer the station's programming policies, supervise the station's financial transactions and bookkeeping, set the sales policy, supervise station personnel, and maintain communications between the station and the community.

24. Judy Purtle was born in Kingston, Arkansas on August 7, 1944. Kingston is about 35 miles southwest of Russellville. She graduated from

---

[7] Jackson says that his personal history statement (River Valley Ex. 5) was complete except for a couple of short employment ventures (Tr. 160). So there may have been more than six jobs during this 20 month period.

[8] Jackson claims that employment opportunities for Blacks in Russellville are "[e]xtremely poor"; and that Blacks, unless they want to go into manual labor, have to relocate because of the lack of white collar or management positions. That may be true. But this claim misses the mark. Jackson apparently had no difficulty securing a job; it was keeping the job after he got it that seems to be his problem.

[9] The record also reflects that on two separate occasions Jackson contracted with Station KCAB for spot announcements—once for the Image Agency and once when he was a candidate for the School Board. Both times Jackson refused to pay for those spot announcements (Tr. 188–194).

High School in 1962. From June 1962 until July 1973, she lived in Dardanelle, Arkansas—a community about five miles from Russellville. Since 1973 she has been a Russellville resident.

25. During the 1962–1973 time period Purtle worked intermittently for the Arkansas Valley Bank in Dardanelle. Her total work experience covered about five years. She started out in the bookkeeping department of the bank. Later she worked as a teller in the loan department and was placed in charge of the payroll section.

26. In January 1973, she went to work as a Secretary/Receptionist for Station KCAB (AM) and FM, Dardanelle, Arkansas.[10] In May 1974 she became the station's Business Manager. She was in charge of the accounting and traffic departments.

27. On March 1, 1977, Purtle was made Operations Manager. She held that position briefly until January 1, 1978. However, since no new Business Manager was appointed she wore both hats during that time period. As Operations Manager Purtle directed the training of announcers and news people; she determined what programming to air, which music to play; and which news story to broadcast (Purtle Ex. 1, pp. 3–4; Tr. 256–257, 261, 262–263, and 266–269).[11]

28. On January 1, 1978, Purtle became Assistant Manager of KCAB and KWKK. She occupies that position at the present time.[12] As Assistant Manager she supervises the traffic and accounting departments and coordinates these departments with sales and programming. She manages the in-coming and out-going mail, the daily and weekly sales and collection reports, the bank deposits, the accounts receivable and payable, the cash disbursements, budgeting, and the public and political files. She answers staff questions. And she is fully responsible for the accounting system and prepares the books for the station's accountants[13] (Purtle Ex. 1, p. 4; Tr. 232, 256, and 279).

29. Purtle works full-time as Assistant Manager. She works a 45 to 50 hour work week spread over 5½ days (Tr. 223, 322). She has received a number of letters of commendation and awards from Ron Rye, KCAB/

---

[10] Station KCAB (FM) has since changed its name to KWKK (FM).

[11] During cross examination and on rebuttal River Valley attempted to show that Purtle wasn't KCAB's Operations Manager during that brief time period and that she didn't have the substantial responsibility she claims she had. Those attacks were unsuccessful. There is no reason to believe that Judy Purtle wasn't the Operations Manager between March 1, 1977 and January 1, 1978 as well as still being Business Manager or that she didn't perform the functions she claimed she performed. Compare Tr. 230–238, 256–258, 261–262, 286–288 and 389–438 with Purtle Ex. 1, pp. 3–4; Tr. 345–375 and 376–378.

[12] If her application is granted Purtle will cease her present employment at Stations KCAB (AM) and KWKK (FM). (Purtle Ex. 1, pp. 1–2; and Finding Footnote 2 *supra*.).

[13] During her nine years of employment with KCAB/KWKK, Purtle performed virtually all the tasks associated with filing a renewal application. In addition, she has prepared and reviewed program logs; she's sold spot announcements; and she has occasionally produced a commercial. She has also prepared affidavits of performance (Purtle Ex. 1, p. 4; Tr. 229, 238–239, 246–248, 349, 351–354, 357).

KWKK's President (Purtle Ex. 1, pp. 4–5; Purtle Ex. 3, pp. 3–5; Tr. 298–299, 323–324, and 326). Since 1975 she has attended several broadcasting sales seminars and broadcasting conferences (Purtle Ex. 1, p. 6). She also took a course at Arkansas Tech on the Introduction to Business Systems (Purtle Ex. 1, p. 6; Tr. 345).

30. In 1978, Purtle was Co-Director of the Miss Lake Dardanelle Association Beauty Pageant. In 1979 and 1980 she was active in the Pope County Community chest. For the past several years, and as a representative of KCAB/KWKK Ms. Purtle has also been a member of the Russellville Chamber of Commerce and has been fairly active in that organization.

31. Ms. Purtle is also active in the functions of the First Baptist Church of Russellville. Since October, 1981 she and her husband have taught an adult Sunday School class. Previously they were the Directors of the Adult Sunday School Department for two years. Before that, Ms. Purtle worked for two years as Director of a Mission Friends class for four and five year old children (Purtle Ex. 1, pp. 5–6; Tr. 208, 311–319, 321 and 356–357).

32. *Auxiliary Power Proposal.* Of the three applicants only River Valley proposes to acquire, install and maintain an auxiliary power generator to assure continuous operation of its station in the event of a power failure (River Valley Ex. 7).

*Ultimate Findings and Preliminary Conclusions*

1. Horne Industries, Inc. (Horne), River Valley Broadcasting (River Valley) and Judy K. Purtle (Purtle) each seek authority to operate a new FM broadcast station at Russellville, Arkansas on Channel 265A (100.9 MHz). Only one of the three can be granted. Under designated Issue 2 we must determine which one should receive the authorization.

2. The three applicants will be analyzed under the criteria set out in the Commission's *1965 Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393.[14] There the Commission indicated that the comparison process shoud be directed toward two primary objectives: (1) Selecting the applicant which will offer the greatest diffusion of control of mass communications media; and (2) selecting the applicant that will offer the best practicable service to the public.

3. First, and under the Commission's 1965 criteria, it must be concluded that the two comparative contenders are River Valley and Purtle. Horne

[14] The Presiding Officer is fully aware of the Review Board's recent Decision in *Minneapolis Star and Tribune Company*, FCC 82R–7 released February 19, 1982. But he couldn't apply the Board's standards here since no comparative coverage issue was added and no proposed program service inquiry was involved. So there was no choice, and he had to employ the Commission's time-tested 1965 criteria instead of the Review Board's later-developed *Minneapolis* standards.

is out of it.[15] In addition to owning KARV (AM), Russellville, Arkansas, Michael Horne (the President and 100% owner of Horne Industries) is an officer, director and controlling stockholder in: KIKZ, Seminole, Texas; KOYY (AM) and (FM), El Dorado, Kansas; and KWCK (AM) and KSER (FM), Searcy, Arkansas. So Horne is a clear loser under the Diversification of Mass Media criterion alone.

4. However, Horne proposes no integration of ownership into its day-to-day operation. So even if it could survive its lack of diversification it offers nothing toward providing the best practicable service to the public. Under these circumstances Horne is eliminated from any further analysis.

5. *Diversification of Control of Mass Media.* Neither River Valley nor any of its principals have any broadcast or other mass media interests. The same is true for Judy Purtle. So neither applicant warrants a preference under the diversification of control criterion. Both offer the greatest diffusion of control of mass communications.

6. *Best Practical Service to the Public.* In deciding which applicant will offer the best practical service to the public four factors will be considered: (1) The degree each will integrate ownership into the day-to-day management of the station (Quantitative integration); (2) the attributes each of the integrated owners will bring to the day-to-day management (Qualitative integration); this includes such virtues as past broadcast experience; local residence; and past participation in civic affairs in the proposed community of license; (3) whether the degree of quantitative and qualitative integration each will bring is enhanced by minority ownership; and (4) whether either will provide an auxiliary power supply to assure continuous operation in the event of a power failure.

7. *Judy Purtle—Quantitative Integration.* Purtle claims 100% quantitative integration. As the sole owner, she will also be the station's General Manager. She will devote at least 40 hours a week to the station's operations, and to managing the station's day-to-day affairs. She'll plan the program schedule, determine and administer the station's programming policies, and supervise the station's financial transactions and bookkeeping. She'll set the station's sales policy, supervise the station's personnel and maintain communications between the station and the community. So her 100% quantitative integration claim will be fully credited.

8. *Judy Purtle—Qualitative Integration.* Purtle is a Russellville resident and has been since 1973. And for the eleven years before 1973 she

---

[15] It has been obvious from the outset that unless Horne could get River Valley and Judy Purtle to eliminate each other from comparative consideration its chances of prevailing in a comparative hearing against either one were nil.

lived in Dardanelle, Arkansas—about five miles away. She has been active in both community and church activities in Russellville and a member of the Russellville Chamber of Commerce.

9. But most importantly, Purtle brings nine solid years of quality broadcast experience to her proposal. Since January 1973 she has worked for Station KCAB (AM) and KWKK (FM) in Dardanelle, Arkansas. She started out as a Secretary/Receptionist and has worked her way up, through Business Manager, and Operations Manager, to become the Assistant Station Manager. She has participated in almost every phase of day-to-day management. She supervises the station's traffic and accounting departments and coordinates those departments with sales and programming. She manages all phases of the station's financial activity; i.e., the bank deposits, the accounts receivable and payable, the cash disbursements and budgeting.

10. She has performed virtually all the tasks associated with filing a renewal application; she's prepared and reviewed program logs; she's sold spot announcements, prepared affidavits of performance, and even participated in producing an occasional commercial.

11. Based on the foregoing (Conclusions 8–10), it must be concluded that the quality of Judy Purtle's integration is high. There is every reason to believe that her local residence, and her civic participation, when combined with her solid past broadcast experience will enable her to offer a good practical broadcast service to Russellville, Arkansas, and its residents.

12. *Judy Purtle—Minority Enhancement.* Judy Purtle's 100% integration proposal is greatly enhanced by her own female participation as the Station's General Manager.

13. *Judy Purtle—Auxiliary Power.* As previously noted (see Finding para. 32 *supra.*), Purtle doesn't propose to acquire, install and maintain an auxiliary power generator.

14. *River Valley—Quantitative Integration.* River Valley also claims 100% quantitative integration. Both of its two stockholders will be integrated into the day-to-day management of the station. Jerry Canerday, River Valley's President and 85% stockholder, will be the station's full-time Station Manager. He will devote at least 40 hours a week to the station's operation. As manager he'll direct all aspects of the station's programming, sales, promotion and engineering. He'll establish the station's policies and practices and all station personnel will report to him. Based on these facts River Valley's claim of 85% quantitative integration for Jerry Canerday will be credited.

15. River Valley also claims a 15% quantitative integration credit for Almer Jackson. Jackson, River Valley's Vice-President and 15% stockholder, will serve as full-time Operations Manager; and he'll be especially

responsible for programming and news. Jackson intends to devote at least 40 hours per week to the station's operations.

16. Purtle attacks Jackson's 15% quantitative integration claim. See Footnote 1 *supra*. She argues that Jackson has no financial stake in the River Valley proposal and has only been given a small 15% ownership interest because he's Black. The record supports these claims. But even so it doesn't make River Valley's 15% integration claim for Jackson any less valid. The record fully supports River Valley's claim that the Jackson-Canerday stock agreement was an arms-length agreement; that Jackson intends to honor that agreement; that he'll eventually pay the necessary $15,000 for his 15% stock interest; but that right now Canerday is providing the security so that the Bank will make the $15,000 available.

17. In brief there is no record reason not to believe that River Valley has two *bona fide* stockholders and that both stockholders will devote at least 40 hours per week to the day-to-day management of the proposed station. So River Valley's claim of 15% quantitative integration for Almer Jackson will also be credited. This means that quantitatively both applicants are credited with 100% integration of ownership with management.

18. *River Valley—Qualitative Integration.* Jerry Canerday resides in nearby Dardanelle, Arkansas. He has lived there since 1973. But he owns a muffler business in Russellville and spends much of his working day there. He, and his family, are active in the Grace Baptist Church in Russellville. In addition to his muffler shop, Canerday also owns a ranch with 10–21 head of cattle which he raises for sale. Canerday has no broadcast experience. The record justifies the conclusion that he's an honest and hardworking individual who believes he can make a go of it in broadcasting if he's granted the license in this case. If only Canerday's integration qualities were being considered, you could describe River Valley's qualitative integration as being adequate but not substantial.

19. However, River Valley also seeks 15% integration credit for Almer Jackson. And Judy Purtle has successfully shown that the quality of Jackson's integration is poor. She has shown Jackson to be untruthful (see Findings paras. 17–18 *supra*.) with less than a stable employment record (see Finding para. 19 *supra*.). She has also demonstrated that Jackson has dead-beat propensities (see Footnote 9).[16] So, all-in-all, River Valley's 100% quantitative integration is qualitatively subaverage.

20. *River Valley Minority Enhancement.* 15% of River Valley's integration proposal is enhanced since Almer Jackson is Black.

---

[16] It is also true that Jackson hasn't displayed much interest in or knowlege of the proposal. He has invested no money in the proposed operation so far. And he hasn't bothered to familiarize himself with station's proposed programming although that is supposed to be his area of responsibility.

21. *River Valley's Auxiliary Power.* River Valley proposes to install and maintain an auxiliary power generator to assure continuous operation of its station in the event of a power failure.

*Ultimate Conclusion*

22. Judy K. Purtle must prevail over River Valley under the standard comparative issue. Neither applicant gets a diversification preference, and River Valley is entitled to only a slight preference for its auxiliary power proposal. See *Fox River Broadcasting, Inc.*, 50 RR 2d 1321 (1982); and *WVOC, Inc.*, 45 FCC 2d 420 at para. 7; and 29 RR 2d 893, 899 (R. Bd. 1974), review denied FCC 74–633 released June 13, 1973.

23. The case turns then on the integration of ownership with management criterion. Although both applicants are entitled to 100% quantitative integration, Purtle's qualitative integration is markedly superior to River Valley's. Her nine solid years of quality broadcast experience when combined with her local residence, and her civic participation give Purtle a high qualitative credit. River Valley's qualitative integration, on the other hand, is subaverage. Moreover, Purtle's 100% high quality integration is substantially enhanced by her female participation as the Station's General Manager, while River Valley's subaverage integration is only enhanced slightly by Almer Jackson's minority 15% ownership status.

24. In summary, Judy Purtle's proposal will offer the best practical service to the public in the Russellville, Arkansas area, and her application will be granted.

SO, unless an appeal is taken from this Initial Decision or the Commission reviews it on its own motion, Judy K. Purtle's application (BPH–800807AE) IS GRANTED: and Horne Industries, Inc.'s (BPH–11185), and River Valley Broadcasting, Inc.'s (BPH–800711AJ) applications ARE DENIED.[17]

FEDERAL COMMUNICATIONS COMMISSION

Walter C. Miller
Administrative Law Judge

[17] If exceptions aren't filed within 30 days, or the Commission doesn't review the case on its own motion, the Initial Decision will become effective 50 days after its public release. See 47 CFR 1.276(d).

Application, Dismissal of
Reconsideration, Petition for, Denial

Petition for reconsideration of staff's action of February 23, 1982, denied. Under Section 73.3525, republication required where application to be dismissed would have provided first local outlet to a community of 2,382, and remaining application would provide a second local outlet (first fulltime) to a community of 41,600.
-*Mobile B/cing Service, Inc.*

FCC 82–442

**BEFORE THE**

# FEDERAL COMMUNICATIONS COMMISSION

**WASHINGTON, D.C. 20554**

| | |
|---|---|
| In re Request of: | |
| MOBILE BROADCASTING SERVICE, INC.<br>Prichard, Alabama | BP–20,613 |
| MBB, INCORPORATED<br>Daphne, Alabama | BP–780728AH |
| For Construction Permits | |

MEMORANDUM OPINION AND ORDER

Adopted: October 6, 1982; Released: October 22, 1982

BY THE COMMISSION:

1. On October 16, 1981, we received a request for approval of an agreement in which Mobile Broadcasting Service, Inc. (Mobile), applicant for a new AM station in Prichard, Alabama, would reimburse MBB, Inc. (MBB), for its legitimate and prudent expenses incurred in prosecuting its mutually exclusive application for a new AM station in Daphne, Alabama. Upon approval, MBB's application would be dismissed. Because there was then a third mutually exclusive application pending, approval of the agreement would have had the effect of changing the comparative proceeding from a three-applicant to a two-applicant hear-

ing. On February 23, 1982, the staff ruled that the agreement could not be approved without republication under section 73.3525 of the Commission's Rules.[1] On March 25, 1982, the applicants filed a joint request for reconsideration of that action. On our own motion, we have considered the joint petition as an application for review of the staff's action.

2. At the outset, the applicants state that since the initial staff ruling in this case, an agreement has been reached with the third mutually exclusive applicant, so that only the Mobile and MBB applications will remain. Assuming favorable action on the third applicant's proposal, approval of the MBB buy-out would permit the prompt construction of the proposed Prichard station. In further support of their petition, the applicants state that Prichard's population is 41,600, while Daphne has only 2,382 residents. Mobile states that while Daphne has no local broadcast outlets, Prichard has only one AM station licensed to it, and that station is limited to daytime operation. Mobile contends that Prichard needs a second competitive outlet more than Daphne needs its first local outlet. Mobile also contends that the MBB proposal seems to be located in such a way as to provide service to Mobile, Alabama, not Daphne.[2] In any event, the applicants state that a first local service is not always to be preferred over a second service to a larger community, citing *Kent-Ravenna Broadcasting Co.*, 44 F.C.C. 2603 (1961), *Wilmer E. Huffman*, 32 F.C.C. 1 (1962), and *WKYR, Inc.*, 37 F.C.C. 132 (Rev. Bd. 1964). They assert, therefore, that *Mineola Broadcasting Co.*, 45 F.C.C. 552 (1963), is not dispositive. The staff cited that decision, which emphasizes the importance of a first local outlet. The applicants contend that a balance must be made between the respective communities, and that Prichard is the winner as a result of the balance.[3] Although the applicants believe that the question is a close one, they note that the Commission has not required republication in close cases, citing *Howard McBee*, 19 F.C.C. 2d 800 (1969), and *The Reginald Fessenden Educational Fund*, 42 R.R. 2d 1061 (B/c. Bur. 1978). Finally, the applications have been on file for several years and were cut off on July 31, 1978. The applicants state that prompt initiation of service is also a factor considered by the Commission, citing *Allegan County*

---

[1] Section 73.3525(c)(1) provides:

> If upon examination of the proposed agreement the FCC finds that withdrawal of one of the applications would unduly impede achievement of a fair, efficient and equitable distribution of radio service among the several states and communities, the FCC shall order that further opportunity be afforded for other persons to apply for the facilities specified in the application or applications to be withdrawn before acting upon the pending request for approval of the agreement.

[2] MBB, the Daphne applicant, "expresses no opinion with regard to . . . Daphne's need for a broadcast facility."

[3] Mobile also asserts that Daphne does not need an additional reception service, in contrast to a transmission service, because the city receives reception service from six AM and nine FM stations. Mobile has not set out the number of signals received in Prichard, but it appears that Prichard receives at least as many stations as Daphne, if not more.

*Broadcasters, Inc.*, 83 F.C.C. 2d 371 (1981), and *Western Connecticut Broadcasting Co.*, (F.C.C. 2d 1492 (1982). Republication would only add to the delay already encountered. The applicants urge approval of the buy-out agreement to avoid such a delay.

3. The Commission fully set out the rationale behind the rule when it was adopted:

> [The rule] suspends the operation of the "cut-off" rules, thus enabling the Commission to accept additional applications for the facilities sought to be withdrawn. Should another application be filed, the Commission can evaluate the relative needs of the communities concerned, instead of having the 307(b) issue precluded by an agreement between the applicants which results in the withdrawal of one applicant with no opportunity for other interested persons to apply for the same facilities.
>
> 6. The nececessity to make this opportunity available is particularly pressing when a 307(b) issue is presented, for the grant of the remaining application may totally preclude the establishment of facilities in the community which the withdrawing applicant had sought to serve. Although it is not uncommon for the grant of broadcast facilities (particularly for standard broadcast stations) to preclude the establishment of further service in other communities, and though much of the distribution of facilities has thus been made on a random demand basis, the situation with which we are here concerned is different. For the proposed rule is not directed to the situation where there is but one application before us, but touches only those cases wherein there has been demand for broadcast facilities in a particular community, expressed in an application, and where that application is then proposed to be withdrawn via an agreement between competing parties. In these circumstances, we make the considered judgment that our statutory responsibility under Section 307(b) will be met and the public interest best served by protecting the broadcasting needs of particular communities for which broadcast facilities have been proposed, and then withdrawn, by providing, by Rule, for further opportunity where appropriate for other persons to apply for the facilities sought to be withdrawn.

*Dismissal of Applications Agreement (Docket No. 13913)*, 20 R.R. 1673, 1674–75 (1961).

4. We believe that there is clearly a section 307(b) issue presented by the facts of this case. We have always placed a very high priority on providing a first local outlet. "Although it is impossible to devise a system under which every local community, no matter how small, can have its own local station, the benefits of at least one local station in as many communities as possible are obvious." *AM Station Assignment Standards (Docket No. 15804)*, 2 R.R. 2d 1658, 1668 (1964). That priority ordinarily takes precedence over bringing multiple outlets to a city. *AM Station Assignment Standards, (Docket No. 15804)*, 25 R.R. 1615, 1626 (1963) (Notice of Proposed Rulemaking). The applicants are correct in noting that a first local outlet may not always take priority, but the cases it cities (*Kent-Ravenna, WKYR* and *Huffman*, above) all involve judgments made, or to be made, after a full record was developed in hearing. We know of no AM case, and the applicants cite none, where a buy-out agreement was approved that would result in the dismissal of an applica-

tion proposing a first local outlet, unless republication had already been accomplished, unless there were additional aural frequencies that had been or could be applied for in that community, or unless the remaining applicant also proposed to provide a first local outlet. For cases requiring republication, *see, e.g., William B. Neal,* 44 F.C.C. 2554 (1961), and *Holston Brodcasting Corp.*, 45 F.C.C. 1551 (Rev. Bd. 1964). For cases not requiring publication based on a showing of other aural frequencies available in a community, *see, e.g., Waterman Broadcasting Corp. of Texas*, 10 F.C.C. 2d 712 (Rev. Bd. 1967); *Great Southern Broadcasting Co.*, 41 R.R. 2d 1578 (B/c. Bur. 1978). The balancing that the applicants wish us to make has clearly been made after a hearing, not at this stage of the proceeding.

5. The "close case" rulings referred to by the applicants involved in one case (*McBee*, above) two applicants for similarly sized communities, neither of which had a local outlet, and the remaining applicant proposed to serve a city that received fewer off-the-air signals than the city specified in the application to be dismissed. The staff's ruling in *Fessenden*, above, is distinguishable as there was at that time another channel available for application (Channel 65) for an outlet in the community specified in the application to be dismissed. We do not believe that the present case qualifies as a "close case." The applicants have not shown that other aural frequencies are available for application in Daphne if the buy-out agreement is approved. The purpose of the rule is to determine if there remains interest for an outlet in that community. In the absence of a showing that other frequencies are available, the approval of the agreement appears totally to preclude the establishment of an outlet in Daphne. As in the past, that is not a result we wish to reach without the benefit of a full hearing record. Republication is called for, and to hold otherwise would vitiate the rule.

6. We have recognized in other contexts that we should take all possible steps to expedite service to the public. The *Allegan* and *Western Connecticut* cases, above by the applicants, provide examples where we have acted to abolish policies that, on balance, do not outweigh the delay of service to the public. The goal of expedition, however, does not override all statutory objectives. When the rule was adopted, we stated:

> The additional time which would be allowed for filing further applications under the rule (two weeks for publication plus 30 days), plus the added delay necessitated by a hearing should further applications be filed, has been criticized by commenting parties as unfairly adding to the time that a party must wait before his application can be acted on by the Commission, and which time would be eliminated if agreements were approved and the rule not in effect. . . . Our considered judgment is that all cases where 307(b) issues arise our responsibility under that section can best be discharged through adoption of the Rule. . . . While the prompt disposal of all matters before us is desired, speed as a goal in the administrative process cannot be pursued irrespective of the results achieved.

*Dismissal of Applications by Agreement (Docket No. 13913)*, above, 20 R.R. at 1675. One other fact should be mentioned. These applications have been pending a long time. The majority of the delay, however, has been brought about by delays resulting from the negotiations amongst the competing applicants, not by our processes.

7. We are mindful of the delays involved in this and in similar cases. Nonetheless, we are bound by the statute, and the rule, as interpreted, is designed to promote section 307(b) goals. The rule clearly applies to the facts of this case. If the applicants seek relief from its requirements, it is better sought through the rulemaking process.[4]

8. Accordingly, the request for approval of the buy-out agreement between Mobile and MBB without republication IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico *Secretary*

[4] Unlike the circumstances in *Allegan* and *Western Connecticut*, above, dealing with changes in Commission policies, we deal in this case with a specific rule. The Court has recently reminded us "that the 'summary and sub silentio overruling of a policy established through the rulemaking process' cannot be tolerated." *Communications Investment Corp.* v. *F.C.C.*, 641 F.2d 954, 978 (D.C. Cir. 1981) (footnote omitted).

Domestic Public Land Mobile Radio Service
One-Way Communications
Paging Service
Private Land Mobile Radio Service
Rules, Amendment of

Report and Order adopted re amendment of Parts 2, 22, and 90 of rules to allocate spectrum in 928–941 MHz band and to establish other rules, policies and procedures for one-way paging stations in the Public and Private Land Mobile Radio Services.
—*Paging Operations*
GEN. Docket No. 80–183

FCC 82–339

**BEFORE THE**

# FEDERAL COMMUNICATIONS COMMISSION

**WASHINGTON, D.C. 20554**

| | |
|---|---|
| In the Matter of | |
| Amendment of Parts 2, 22, and 90 of the Commission's Rules to Allocate Spectrum in the 928–941 MHz Band and to Establish Other Rules, Policies, and Procedures for One-Way Paging Stations in the Domestic Public Land Mobile Service and the Private Land Mobile Radio Services | GENERAL DOCKET NO. 80–183<br>RM–2365<br>RM–2750<br>RM–3047<br>RM–3068 |

SECOND REPORT AND ORDER

Adopted: July 22, 1982; Released: August 20, 1982

BY THE COMMISSION: COMMISSIONER JONES CONCURRING IN THE RESULT.

## *I. Introduction*

1. On April 24, 1980, in response to petitions filed by the Ad Hoc Private Paging Committee (AHPPC) and Telocater Network of America (Telocater), we adopted a *Notice of Proposed Rule Making*, which proposed the

allocation of three MHz of spectrum for private and common carrier paging systems in the 929–932 MHz band.[1] An alternative allocation plan was later proposed in a *Supplemental Notice*, and the proposed original plan as it pertained to private paging systems was modified in a *Further Notice*.[2]

2. In our *First Report and Order*, we determined to authorize private paging systems in the 929–930 MHz band, to hold the 930–931 MHz band in reserve for future use by advanced technology paging systems, and to authorize the 931–932 MHz band for common carrier paging systems.[3] In that same proceeding we also adopted rules to govern the common carrier systems.[4] However we deferred taking action on specific private paging rules until after a full consideration of the issues raised in the *Further Notice*. We now address these issues.

## *II. Background*

3. In our original *Notice*, we proposed to release three MHz of spectrum for paging operations pursuant to our traditional administrative approach.[5] Under this approach spectrum is allocated by attempting to determine the need for given types of services and then allocating blocks of frequencies for each. Accordingly, we proposed to release one MHz of spectrum to the private services, one MHz to common carriers and one MHz between the services to be held in reserve for future use by advanced technology paging systems. Both the Common Carrier and Private bands were subdivided into 40 (25 KHz) channels.

4. In the 929–930 MHz band set aside for private systems, we proposed that thirty-two (32) of the forty channels would be for tone-voice paging, six (6) would be for tone-only operations and two (2) channels would be set aside for tone-optical readout paging.[6] Under the proposal, the Commission staff would select and assign frequencies in the private band based on fixed mileage separation criteria and channel loading standards. Finally, it was proposed that any private licensee operating in a tone-voice paging mode who could meet the established loading criteria would be given

---

[1] *Notice of Proposed Rule Making*, Docket No. 80–183, 45 Fed. Reg. 32013 (May 15, 1980).

[2] *Supplemental Notice of Proposed Rule Making*, Docket No. 80–183, 45 Fed. Reg. 73979 (November 7, 1980); *Further Notice of Proposed Rule Making*, Docket No. 80–183, 47 Fed. Reg. 16052 (April 14, 1982).

[3] *First Report and Order*, Docket No. 80–183, 47 Fed. Reg. 24557 (June 7, 1982).

[4] Additionally, we adopted the concept of a "flexible boundary," whereby users in one service would be permitted to use spectrum allocated to the other service, if the need arose because of congestion. However, due to implementation problems we decided not to adopt specific rules at this time. See *para.* 9 *infra*.

[5] *Notice of Proposed Rule Making*, Docket No. 80–183, *supra*, note 1.

[6] This allocation plan was based on studies that demonstrated a trend in private paging systems toward tone/voice paging systems. See *Notice of Proposed Rule Making*, Docket No. 80–183, *id.* at *para.* 9–20.

exclusive use of the frequency.[7] The proposed technical and loading rules for the private paging systems generally followed the regulatory structure in effect for base/mobile two-way operations in the 800 MHz band.[8]

5. Following our original *Notice*, we released a *Supplemental Notice*, in which we proposed an alternative allocation plan.[9] This plan was designed to be more flexible in the allocation and use of the spectrum. The alternative proposal retained the basic allocation of three MHz, however, the private and common carrier bands were to be placed next to each other, to allow each type of user to access the other's spectrum, if the one MHz originally allocated to that user's category became too congested.

6. Additionally, rather than a compartmentalized private band with specific channels earmarked for certain modes of operation, as proposed in the original *Notice*, all private channels were to be available for any type of paging use. All technical, loading and sharing standards for private users remained as in the original proposal.

7. The comments submitted in response to the *Notice* and *Supplemental Notice* raised a number of significant issues with regard to private paging systems. In light of these comments, we determined to explore many of these matters in a *Further Notice* before adopting final rules to govern private paging operations.[10] Based on the comments, we determined that there was merit to an allocation approach which maximizes user flexibility in the design and implementation of systems. Accordingly, in the *Further Notice* we proposed to release the private spectrum without designating any particular mode of operation for any channel. Furthermore, to allow frequency assignments to be made on a "tailored basis," it was proposed that applicants select their own frequencies, through the use of a frequency coordinator or by an independent field study. A further objective of this approach was to permit the "engineering-in" of systems to maximize use of the spectrum.

8. We also proposed not to authorize any channel exclusivity and suggested a minimum loading standard of 600 units per channel. Alternatively, it was proposed that a licensee be allowed to use actual on-the-air occupancy statistics to establish appropriate loading. Comments were requested to help determine the appropriate loading zone for channel loading and appropriate standards for the use of on-the-air occupancy statistics. Finally, comments were requested on whether private carriers

---

[7] To be given exclusive use of a frequency the licensee would have had to load a channel to at least 70 percent of the established loading level.

[8] *Second Report and Order*, Docket No. 18262, 46 FCC 2d 752 (1974), *recon. granted in part*, 51 FCC 2d 945 (1975), *clarified* 55 FCC 2d 771 (1975), *aff'd. sub nom. NARUC* v. *FCC*, 525 F2d 630 (D.C. Cir. 1976). *cert. denied*, 425 U.S. 922, (1976).

[9] *Supplemental Notice*, Docket 80–183, *supra*, note 2.

[10] *Further Notice of Proposed Rule Making*, Docket No. 80–183, *supra*, note 2.

should be authorized in the private spectrum to provide a paging service to eligibles on a commercial basis.[11]

9. On April 29, 1982, we adopted a *First Report and Order* concerning the paging allocation.[12] We determined to release the spectrum as originally proposed, with one MHz of spectrum assigned to the private paging services, one MHz assigned to common carrier paging and one MHz between the services to be held in reserve for future advanced technology paging. We also adopted the concept of a "flexible boundary," as proposed in the *Supplemental Notice*, whereby private and common carrier licensees could access the other's spectrum if either of the allocated bands became too congested. However, because it was envisioned that the two services would assign frequencies by different means (*i.e.*, frequency coordination in the private band and fixed mileage separation in the common carrier band), we found that the problems in implementing this concept would be extensive. Accordingly, we determined to study the matter further before deciding the specific rules to adopt to implement a "flexible boundary."

10. In the *First Report and Order* we also established rules to govern the operation of common carriers in the 931–932 MHz band. However, because comments were still being received in response to the *Further Notice*, we deferred consideration of all issues relating to the private paging systems. We now establish rules to govern the operation of private paging systems authorized to operate in the 929–930 MHz band.

## *III. Discussion*

### *Allocation of Spectrum*

11. In our *Further Notice* we recognzied that there is merit to an allocation approach which maximizes user flexibility in the design and implementation of private paging systems. Therefore, we proposed to allow user choice to determine the mode of operation employed on all 40 channels available in the private services rather than to designate each channel for a particular mode of operation. Of those parties that commented on this issue, MRFAC, AHPPC, SIRSA, NABER and API, all supported our position that no frequency should be set aside for any particular mode of operation.[13]

12. MRFAC stated that this flexible approach is more spectrally efficient than any pre-designated allocation by mode of operation. It also stated that this flexible approach would be more economical for users

---

[11] SMRS private carrier licensees are currently authorized to provide service on a commercial basis at 800 MHz for two-way systems. See *Second Report and Order*, Docket No. 18262, *supra*, note 8.

[12] *First Report and Order*, Docket No. 80–183, *supra*, note 3.

[13] See Appendix A for a list of all parties who commented in this proceeding.

employing more than one type of paging technology because it would enable them to avoid the costs of multiple base stations necessary to operate on separate designated channels. MRFAC contended, that even under a flexible channel use approach, only those users with compatible paging systems should be assigned to share the same channels.

13. NABER stated that it agreed with the Commission's proposal to allow users to play a greater role in structuring the utilization of the new frequencies. SIRSA expressed the view that adoption of our proposal would maximize user options and encourage manufacturers to provide the most advanced and spectrally efficient equipment. API stated that it has always endorsed the concept of allowing users maximum flexibility in satisfying their communications requirements. It argued that "it is not in the public interest to force users to employ one type of system rather than another type."

14. After careful consideration of these and other comments, we have decided to adopt our proposal to allow licensees to determine the paging technology to be employed on all 40 channels in the 929–930 MHz private paging band.[14][15] We conclude that an allocation plan which designates specific channels for particular modes of paging technolgy would unnecessarily restrict user options and artificially structure the market place. We conclude that the public interest is best served when the users determine which mode of operation meets their private paging requirements, and thus expect to encourage the larger and more effective use of radio, as mandated by the Act.[16]

15. Furthermore, an allocation that designates a specific mode of operation, such as tone-only, tone-voice or tone-optical-readout for each channel creates a disincentive for manufacturers to create new or hybrid technologies because no channels will be immediately available for these technologies.[17] Similarly, if a very limited amount of spectrum is allocated

---

[14] In our proceeding in Docket No. 79–191, we also determined that it was in the public interest to allocate spectrum according to user demand rather than by a particular mode of operation (*i.e.* trunked or conventional systems) for two-way operation in the 800 MHz band. *Second Report and Order*, 90 FCC 2d 1281, FCC 82–338 adopted July 22, 1982, released August 16, 1982.

[15] To maximize the use of these 40 channels, we will not authorize an exclusive channel assignment for any licensee. However, we are also adopting frequency coordination procedures, and we expect that all licensees will be adequately accommodated. See *para.* 39–49, *infra.*

[16] 47 U.S.C. 303(g).

[17] We are concerned that some of our current general rules have not kept pace with the dynamic state of paging technology. For example, to facilitate the use of tone-optical readout paging technology, we foresee a need for an interface between computers located at eligible users' premises and paging transmitters. In these types of systems paging messages can be composed at a computer terminal in a user's office and then sent via telephone lines to the base station for subsequent transmission. The composition and transmission in a "real-time" fashion may not conform to the requirements of Section 90.490, formerly Section 90.487, of our Rules depending on system design. To the extent that new systems or special circumstances evolve which do not conform to Rule Section 90.490, the Private Radio Bureau, pursuant to delegated authority, will consider requests for waiver of the rule. In determining whether to grant the waiver, the Bureau will consider if the circumstances are such that paging technology will be unnecessarily hampered by the provisions of Rule Section 90.490, 47 C.F.R. § 90.490.

for a particular technology, manufacturers, due to cost considerations, may be less inclined to improve this technology. In contrast, under our flexible allocation approach manufacturers will be motivated to meet market place demands for new and improved technologies.

16. Under the rules we are adopting, different modes of operation may be utilized on the same channel. We are aware of the concern that incompatibility may result among co-channel users who have selected different paging modes because of the different channel occupancy rates that occur with each technology. For example, tone-only paging involves a very short transmission time, whereas tone-voice paging signals are generally much longer. However, this is a matter that the frequency coordination procedures we are adopting herein should substantially alleviate. Under these procedures applicants must select and the Commission will authorize only the use of channels that will result in the least amount of interference to co-channel users. Applicants doing field studies or coordinators recommending channels must take into account technical factors, including mode of operation and channel occupancy characteristics, when selecting a channel.

*Specialized Mobile Radio or Private Carrier Systems*

17. In the *Further Notice*, the question was posed whether we should authorize private carrier licensees to provide paging service to private land mobile eligibles on a commercial basis. We noted that SMRS licensees are currently authorized at 800 MHz to provide eligibles with two-way communications service. We requested comments on whether it would be in the public interest to provide users with the option of receiving one-way paging service from private carrier licensees.

18. The comments were split on the issue of whether private carrier licensees should be authorized for 900 MHz paging. Telocator, MRFAC and SIRSA all opposed allocating any channels in the 900 MHz private paging spectrum for private carrier operation. AHPPC pointed out a number of concerns it had with private carrier licensees being authorized to provide 900 MHz paging and requested that we carefully consider these points before making a decision on this issue. API, Meta Systems and Charles S. Hayes,[18] supported authorizing private carrier licensees in the 900 MHz private band.

19. Telocator stated that licensing private carrier applicants is not compatible with the public interest. It questioned whether the two-tier licensing procedure implemented for provision of two-way private carrier radio service at 800 MHz had applicability to a one-way communications

[18] Charles S. Hayes acted in this matter as an individual. Mr. Hayes is Secretary of Alert Paging, Inc. an RCC in Mishawaka, Indiana and Vice-President of Mid-America Broadcasting Company Inc., an RCC in Charlotte, Michigan.

service. Telocator pointed out that at 800 MHz, the private carrier entrepreneur is licensed for the base station facility and the users of the base station are licensed for their mobile stations as well as their control stations or control points.[19] Pagers are not transmitting devices and therefore Telocator questioned how the Commission would license users of pagers. It argued that not to license the users would be an abdication of the Commission's regulatory responsibilities to assure that the facilities are used for pemissible purposes.

20. Additionally, Telocator argued that if the users of pagers are not licensed, the Commission will not be able to determine to what extent and by whom the spectrum is being used. Telocator asserted that this also would be an abdication of the Commission's responsibilities. Finally, Telocator took the position that private carrier operation in the 900 MHz private paging spectrum would constitute unlawful common carriage.

21. MRFAC argued that if private carrier licensees are authorized in a portion of the 900 MHz band they will utilize channels that otherwise would have been available to eligibles for their own private systems. It asserted that any allocation of 900 MHz private paging channels to commercial operators would deprive private users of badly needed spectrum, especially in the large urban areas. MRFAC argued that if private carrier operation is allowed, it would defeat the purpose of the 900 MHz allocation, which, it stated, was to enable users to meet their paging requirements through their own private systems.

22. SIRSA stated that its members who are interested in 900 MHz paging have expressed a strong preference for privately-operated and maintained paging systems. It took the position that for-hire paging service should be provided exclusively by radio common carriers (RCC's). It asserted that the private carrier entity was created in Docket No. 18262 to foster the introduction of trunking technology and to provide an alternative to RCC's for those entities who wished to obtain their two-way mobile radio communications service on a for-hire basis. SIRSA argued that there is no parallel reason for allowing private carriers to provide 900 MHz paging. SIRSA also contended that if the Commission does conclude that private carriers should be allowed to provide a paging service, they should be authorized solely in the 40 channels set aside for RCC's. Furthermore, SIRSA stated that it was concerned that many private carrier entrepreneurs will file applications and secure authorizations but fail to load and utilize their systems. Thus, SIRSA asserted that this could lead simultaneously to 900 MHz paging frequency exhaustion and gross under-utilization of channels.

23. AHPPC stated that there was no demonstrated need for paging service provided by private carrier licensees in the 900 MHz band. It

[19] 47 C.F.R. § 90.397.

argued that the key rationale in authorizing private carrier licensees at 800 MHz for two-way land mobile operations was to promote trunking, and that this does not apply for 900 MHz paging. AHPPC asserted that the need for a private carrier paging system to secure a large coverage area in order to serve a large user base is incompatible with the goal of maximum channel reuse through frequency coordination, as proposed by the Commission. In contrast, it argued that private non-carrier user systems are designed to meet only the user's actual coverage needs and that frequency recommendations or field studies are made on the basis of this known coverage requirement. This promotes more efficient spectrum utilization, AHPPC argued.

24. One of the major concerns of AHPPC was that if private carrier applicants are allowed access to all the private 900 MHz frequencies they would speculate by applying for all the frequencies and thereby force potential private users to forgo paging or to become a private carrier subscriber. Despite its concerns about private carrier licensees providing paging service, AHPPC said, however, that it was reluctant to recommend that the Commission ban any potential class of licensee. It stated that it would encourage private carriers to be authorized for operation on 900 MHz private paging channels, if private users and private carrier applicants did not have to compete for the same channels.

25. API supported the allocation of a portion of the 900 MHz spectrum for the authorization of private carrier licensees to provide one-way paging service on a commercial basis. However,it strongly opposed allowing these entrepreneurs to access all 40 channels allocated for use in the private services. API's concern, shared by SIRSA and AHPPC, was that if private carrier applicants and private non-carrier applicants have equal access to the entire spectrum, the commercial nature of the former would lead to a swift depletion of available frequencies for the latter. It asserted that while it recognized the vital role of private carriers in the provision of private land mobile communications service, these systems should not foreclose the availability of spectrum for other users.

26. In light of this, API recommended that 10 channels be allocated for private carrier operation and that these licensees be prohibited from obtaining assignments for the remaining 30 channels. API stated that such an action would not be without precedent. It pointed to Docket No. 79–191 in which the Commission proposed to set aside a portion of the channels in the reserve 800 MHz band specifically for SMRS private carriers to provide two-way communications service.[20]

---

[20] *Further Notice of Proposed Rule Making*, Docket No. 79–191, 46 Fed. Reg. 37927, (July 23, 1981). The Commission is adopting this allocation approach for 800 MHz, two-way systems. *Second Report and Order*, 90 FCC 1281, FCC 82–338, adopted July 22, 1982, released August 16, 1982.

27. Meta Systems, a company currently developing an advanced electronic message system featuring portable tone-optical receivers, supported allowing private carrier licensees to provide a one-way paging service at 900 MHz. Meta Systems asserted that the private carrier concept has been carefully scrutinized by the Commission as well as the courts and has been held to be a legitimate private service.[21] It argued that nothing in this proceeding contradicts the rationale for authorizing private carrier operations for one-way paging.

28. If authorized, maintained Meta Systems, private carrier licensees would provide healthy competition among operators and would encourage the development and refinement of new technologies, such as the spectrally efficient tone-optical readout service. Furthermore, Meta Systems asserted that because private carrier licensees are able to design their paging services to meet the specific demands of those eligibles they have contracted to serve, many users would benefit from this type of particularized service. It stated that in the past three years there has been great demand for private carrier service in the 800 MHz band and that the Commission, therefore, reasonably could anticipate a similar demand at 900 MHz.

29. After careful consideration of the comments, we have determined that it is in the public interest to authorize private carrier paging systems (PCPS) licensees to provide one-way paging services to eligibles in the Private Land Mobile Radio Services on a commercial basis in the 900 MHz private spectrum. We conclude that users will benefit by having several paging service options available to satisfy their individualized service needs, *i.e.*, private systems (including shared-use of paging transmitter facilities through multiple licensing or cooperative sharing arrangements), individually-tailored PCP services, and common carrier paging services. Without the PCP option, users would be denied the ability to secure individually-tailored service arrangements, a basic feature of the PCP option. Our decision to authorize PCP service is consistent with our similar treatment of two-way services in the 800 MHz private frequency bands.[22]

30. However, while we conclude that PCP applicants should be authorized to provide commercial paging service to eligibles, we agree with the

---

[21] *Second Report and Order*, Docket No. 18262, *supra*, note 8. In *NARUC I*, the court found that these entities are not required to provide service indiscriminately, and thus need not be regulated as common carriers. The court upheld the Commission's conclusion that "a competitive environment (resulting from SMRS service) is the best and most feasible way to achieve its goal of most efficient development and use of the 900 MHz band." *NARUC I*, *supra*, note 8, at 645.

[22] *See* note 21, *Id.* See also *United States v. Southwestern Cable Co. et al.*, 392 U.S. 157 (1968) and *Philadelphia Television Broadcasting Co. v. Federal Communications Commission*, 359 F.2d 282 (1966) for discussions of the Commission's regulatory authority to adopt alternative approaches, as an expert agency, in "coping with new developments" in a "dynamic industry." See also, Docket 79-191, *Second Report and Order*, *supra*, note 20.

concerns expressed in the comments that private users generally do not apply for channels until they need them, unlike commercial applicants who have an immediate need for channels as part of a business venture. Therefore, to assure that all private service eligibles, and PCP applicants have an opportunity to apply for channels and implement systems in a manner best suited to their needs, we conclude that spearate allocations are necessary to encourage the most effective use of radio in the public interest.[23]

31. Therefore, consistent with our broad authority to classify radio stations, to assign frequencies to various classes of stations, and to promulgate regulations to prevent interference between stations, we are allocating 30 channels for private non-commercial systems (including shared private systems), and 10 channels for PCP operations.[24] This division was the one suggested in the comments and it appears to be a reasonable approximation of likely user demand. We also conclude that separate allocations are necessary to encourage the larger and more effective use of radio in the public interest, as mandated by the Act, as it will ensure an adequate pool of frequencies for both classes of applicants in each area.[25] We believe this apportionment of channels will provide eligibles with the option of obtaining private carrier paging service from PCP licensees, while reserving adequate spectrum for those users who wish to build and implement their own systems.[26]

32. We also conclude that it is in the public interest that no PCP licensee be assigned exclusive use of any channel because channel capacity for one-way paging service is much higher than for two-way communications. For example, if tone-only services are used, tens of thousands of pagers can be accommodated on a single channel. Therefore, exclusive assignment policies could lead to under-utilization of valuable spectrum resources. Moreover, paging technology is evolving so rapidly that channel capacity continues to increase. Finally, exclusive channel assignments are not necessary for private paging systems as evidenced by our experience with paging system capacity on frequencies below 900 MHz. We point out, however, that although channels will be shared, licensees must cooperate in the selection and use of any channel as required by Rule Section 90.173. In resolving interference complaints, if cooperation does not work, we will require the "last-person-in" to correct the interference problem.[27]

---

[23] See 47 U.S.C. § 303(g).

[24] See 47 U.S.C. § 303(a), (c), and (f).

[25] See 47 U.S.C. § 303(g).

[26] This 900 MHz private paging allocation, although somewhat speculative because these are new channels, is our best determination of what we expect user demand to be. We will review this allocation in the future should a significant number of channels remain in either allocation.

[27] *Sudbrink Broadcasting of Georgia*, 65 FCC 2d 691 (1977); *Jack Straw Memorial Foundation*, 35 FCC 2d 397, *reconsideration denied*, 37 FCC 2d 544 (1972); *B & W Truck Service*, 15 FCC 2d 769 (1968); *Midnight Sun Broadcasting Co.*, 11 FCC 1119 (1947).

33. We also conclude that sharing of channels will provide an opportunity for many PCP entrepreneurs to operate in the same geographic area, thus fostering a more competitive market place for the provision of private paging service. We expect development of paging technology to flourish in a market place environment because there will be many PCP operators to provide a variety of services. For example, some may choose to provide a high quality of service and others may concentrate on serving compatible private services eligibles at the lowest cost.

34. Under the licensing procedure we are adopting, each PCP operator will be the sole licensee for its entire system.[28] Because paging units are not transmitting devices, we will not license users obtaining service from a PCP licensee. Telocator argued that this type of licensing arrangmeent would be an abdication of the Commission's regulatory responsibilities.[29] It contended that a licensing policy directed only toward the private carrier operator, and not the users, would fail to meet our responsibilities to determine user eligibility and compliance with our rules. However, our rules clearly establish constraints on eligibility and operation which are basic licensing conditions. We specifically caution potential PCP licensees that as sole licensees for such systems, they will be responsible for assuring that all operation is conducted in strict compliance with the Commission's Rules and with the Communications Act. We fully expect that each PCP licensee will serve only those users eligible in the private land mobile radio services, and that paging systems will be used only for authorized purposes.[30] We emphasize that, as with other rule and statutory requirements, we are prepared to investigate allegations of non-compliance and to impose sanctions for violations, including forfeitures, suspension and revocation.

*Multi-Area Paging Systems*

35. In its comments, Meta Systems urged that we set aside two or more channels in the 900 MHz private spectrum for nation-wide paging opera-

---

[28] This licensing procedure is not a new approach. Under cooperative sharing arrangements, which have been authorized for many years, a single licensee is responsible for the operation of a system which is shared by many private land mobile eligibles. See Rule Section 90.179. 47 C.F.R. 90.179.

[29] Telocator also urged that private carrier operation in this band constitutes illegal common carriage. Our legal authority to permit private carrier operation has been clearly established. See *NARUC I*, *supra*, note 21. We believe that private carrier paging licensees will offer their services to users on a highly individualized basis. Like the SMRS systems addressed by the Court in *NARUC I*, private paging licensees will be likely to establish "medium-to-long-term contractual relations" with a relatively stable clientele. 525 F.2d at 643. The private operator is also likely to tailor its offerings based on the "personal and operational compatibility of a given applicant" vis-a-vis other users already on the system. *Id.* For example, the needs of one user for a mixed service of tone-only and tone-voice paging messages, on a 24-hour basis, may be incompatible with the needs of certain other, but not all other, users. 525 F.2d at 643, note 13.

[30] In addition to serving only eligibles in the private radio services, we emphasize that PCP licensees are not permitted to operate as common carriers. See *NARUC I*, *supra*, note 21, at 641.

tions.[31] It stated that numerous businesses and governmental agencies have employees who frequently travel and that a multi-city paging service would be a great advantage to such users. Meta Systems emphasized that 900 MHz common carrier spectrum has already been allocated for nation-wide paging operation and that parallel benefits should be accorded to private users. We received no comments in reply to Meta Systems' proposal.

36. Meta Systems contended that to operate most efficiently, a multi-area paging network requires the use of a common radio channel in all geographic areas served so that paging receivers will be simple, light-weight, inexpensive and will not require adjustment or modification when used in different geographic areas.

37. After careful consideration, we are convinced that in today's highly mobile society many users may have a need for one-way private paging in more than one geographic area, and that the public interest will best be served by allocating four channels specifically for multi-area paging operation.[32] Accordingly, we are reserving two channels for multi-area paging of the 30 channels allocated for non-commercial private eligibles, and two of the 10 channels allocated for private carrier operation. We believe that this allocation plan provides enough spectrum for users to meet their needs for multi-area paging sevice through establishment of their own systems or by seeking such service from a PCP operator. By reserving certain channels specifically for multi-area use, private users and PCP licensees will be able to design and rapidly implement multi-area paging systems without concern that a necessary channel might be heavily loaded with purely local paging traffic in a particular geographic area.[33]

38. To assure that the four channels we are reserving for multi-area paging are used for this purpose, we are requiring that each applicant for a multi-area channel must build a transmitter in at least three geographic areas within eight (8) months of the license grant. However, an applicant that is authorized to provide a multi-area paging service will be permitted to provide local service in any geographic area that is part of the multi-area system.

*Selection of Frequencies by Frequency Coordination*

39. We proposed in our *Further Notice* to allow applicants to select their own frequencies either through the use of a frequency coordinator or by

---

[31] Meta Systems filed comments on May 7, 1982 and filed *ex parte* comments on June 24, 1982. The *ex parte* comments supported Meta Systems' earlier proposal for nation-wide paging channels and also described the potential benefits to users from its own tone-optical readout paging system if a nation-wide channel were available.

[32] We note that channels have been reserved for the provision of regional and nation-wide paging services by common carriers, however, we believe that private users should have the opportunity of receiving these types of service options in their own spectrum.

[33] Meta Systems recognized in its comments, that if common channels were not reserved for nation-wide use, considerable time and expense could be required to obtain the same channel allocation through frequency coordination, especially in major urban areas.

an independent field study. We believed that this approach would enable frequency selections and assignments to be made on a more tailored basis. In selecting a channel an applicant would take into account factors present in its geographic area, as well as other factors such as the need for wide area systems, or the accommodation of a particular paging technology.

40. The comments generally supported our proposal for frequency coordination for the 900 MHz private paging frequencies. The parties agreed that frequency coordination for private users would result in more tailored and, therefore, more efficient use of the spectrum allocated.

41. However, a major concern expressed in the comments was that channel selection by frequency coordination is incompatible with the private carrier concept. The commentors apparently took this position because the Commission grants SMRS private carrier licensees in the 800 MHz bands exclusive channel assignments based on co-channel mileage separation standards. SIRSA stated that this will undercut the Commission's goal of maximum channel reuse, which underlies the proposal to establish frequency coordination.

42. MRFAC, which supported our proposal, stated that it strongly opposed the current 800 MHz channel assignment procedures which rely on arbitrary channel loading and geographic separaton standards in assigning channels. MRFAC stated that based on its experience it believed that only frequency coordination can achieve the most efficient utilization of the 900 MHz paging channels for private users. It stated that it has always been a supporter of the use of frequency coordination and urged us to authorize this procedure to select and assign 900 MHz paging channels for private users.

43. API argued that the failure to adopt frequency coordination for the release of the initial 800 MHz channels resulted in efficient use of the spectrum, with some frequencies overburdened and others lightly used in the same geographic areas. AHPPC asserted that frequency advisory committees can select channels in a manner which will result in more frequency usage at equal or better the quality of service than Commission selection of frequencies based on geographic spacing, sequential assignments and vertical stacking.

44. SIRSA, stated that it "trusts the Commission will maintain an 'open door' policy so as to permit as many of the independent frequency advisory committees as wish to participate in the provision of frequency coordination services for these 900 MHz paging channels." On the other hand, NABER asked that it be specifically recognized by the Commission as the only coordinator for these frequencies. In support of its request, NABER submitted a letter stating that, "at its Annual Meeting on April 2, 1982, the Land Mobile Communications Council (LMCC) unanimously agreed to endorse the recommendation that the National Association of

Business and Educational Radio (NABER) serve as frequency coordinator for applicants for 900 MHz private paging systems." AHPPC, while not opposing any *bona fide* user association from providing frequency coordination, questioned whether more than one association could maintain the necessary data base. It made clear that its overriding concern was that the end user obtain the best possible channel.

45. Telecator, which supported the frequency coordination concept in principle, cautioned that unless the coordinators are required to apply some form of vertical stacking in their recommendations, the entire issue of eliminating the barrier between common carrier and private channels will be moot.[34] It argued that without some form of vertical stacking, the first 40 private systems in each market would tie up the entire allocation, regardless of how lightly each channel is loaded. Telocator claimed that for all practical purposes this would preclude assigning any of the channels to common carriers in the future, under the flexible boundary concept.

46. In view of the support expressed in the comments, we are persuaded that frequency coordination is the most efficient way of selecting and assigning frequencies for 900 MHz private paging channels. Therefore, we are adopting rules to require applicants for all 40 channels to select their frequencies through the use of a frequency coordinating committee or by conducting their own field study.[35]

47. Frequency coordination will allow applicants to design their communications systems based upon such factors as terrain, antenna height and transmitter power. Furthermore, it will permit applicants to accommodate their needs for particular service, including wide area configuration. Because licensees will be able to engineer their systems based on their specific circumstances and needs the result will be more efficient spectrum utilization and better service to private users than if the Commission assigned channels based only on vertical stacking and strict mileage separation criteria.[36] This will be especially useful in congested urban areas where systems may be more closely spaced and thus more users may be served.

---

[34] Vertical stacking is a method of channel assignment where one channel is loaded with like users to a certain level before any other channel is assigned.

[35] Applicants who choose to conduct field studies for 900 MHz paging systems must adhere to the standards set forth in Rule Section 90.175. 47 C.F.R. § 90.175.

[36] Because much of the benefit of frequency coordination derives from the flexibility inherent in tailoring systems and assuring compatibility of co-channel users, we decline to require coordinators to follow a sequential assignment or a vertical stacking approach. We expect recommendations to be based on an applicant's proposed number of paging units, area of coveage, power and antenna height considerations, and compatibility of paging technology. We note that the Commission has already recognized that different channel assignment procedures for the private and common carrier paging channels may affect implementation of the flexible boundary concept adopted in the *First Report and Order, supra*, note 3, at *para.* 10–12.

48. We realize that our decision to require PCP applicants for 900 MHz paging channels to select frequencies through frequency coordination is a departure from our regulatory framework for the selection of two-way 800 MHz SMRS channels. Under our 800 MHz scheme the Commission staff assigns channels to SMRS private carrier applicants on an exclusive basis according to fixed co-channel mileage separation standards. We point out, however, that we adopted this assignment approach at 800 MHz because we expected that many private carrier operators would utilize trunking technology which appeared to require exclusive channels. Therefore, because these channels were assigned based on fixed mileage separation standards, frequency coordination would be of little use in selecting these channels.

49. We note that NABER has asked that we recognize it as the sole coordinator for 900 MHz private paging systems. SIRSA, however, requested that we permit any of the independent frequency advisory committees to provide frequency coordination services for this spectrum. We see no reason to decide this issue here because only one entity has thus far offered to provide this service. This entity also is the only one endorsed by the broad cross section of private land mobile users. We, therefore, recognize NABER as the frequency coordinating committee for these 900 MHz frequencies. The Private Radio Bureau will resolve the issue of whether there should be multiple coordinators if it becomes necessary at a future time.

*Channel Exclusivity and Loading Standards*

50. In order to promote the most efficient use of the 900 MHz private paging channels, we proposed in the *Further Notice* to eliminate channel exclusivity and fixed minimum and maximum loading standards. We stated that the frequency coordination procedures we proposed would most effectively determine the number of users that could be accommodated on a channel. We did, however, propose to adopt a minimum loading standard of 600 paging units merely as a benchmark figure upon which to make a determination that a particular channel is reasonably loaded. As an alternative, we proposed that applicants could demonstrate reasonable channel loading with actual "on-the-air" occupancy statistics.

51. AHPPC, SIRSA and MRFAC, recommended that the Commission should retain a loading standard to determine when a licensee would not have to share a channel with other users. These parties contended that elimination of a loading standard to determine when a channel is fully loaded would quickly result in unacceptable degradation of service.

52. Although AHPPC, SIRSA and MRFAC urged the Commission to adopt some realistic loading minimum, they did not support our proposal of 600 units. AHPPC and MRFAC stated that our proposed 600 paging unit standard was unclear. They stated that this was so because we did not

specify whether we meant 600 tone-only pagers, or whether we meant 600 tone-voice pagers.[37] They asserted that a standard of 600 tone-only pagers would be far too low a minimum and 600 tone-voice pagers would be too high for most licensees to accommodate and retain a reasonable grade of service.

53. SIRSA stated that it was concerned about our proposed 600 paging unit standard because it was a 100 percent increase over the 300 tone-voice pager standard set out in the original *Notice*.[38] SIRSA, AHPPC and MRFAC, all favored our alternative proposal of permitting licensees to demonstrate channel loading with actual "on-the-air" occupancy statistics.[39]

54. API specifically supported our proposal not to assign exclusive channels, and tentatively supported our 600 paging unit standard for a minimum loading level subject to its review of other parties views on this issue. Comments filed by Charles S. Hayes, of South Bend, Indiana, supported both the loading standards and channel exclusivity we proposed in the original *Notice*.[40]

55. Finally, Telocater pointed out that if we did not adopt loading standards for private carrier licensees our public interest responsibilities would be "wholly unsatisfied."

56. After carefully considering the comments, we remain convinced that exclusive channel assignments for the private 900 MHz paging channels would be inconsistent with our spectrum efficiency goals. We find that it is in the public interest to guarantee access to private paging channels for all users, rather than to assure a certain quality of service to some users through loading standards, and thereby possibly foreclose access to the private channels to others.[41] Indeed, where spectrum is not exclusively assigned, loading standards could adversely affect the pace of innovation and the development of new services, in much the same manner as arbitrary mode of operation restrictions. If any user desires a certain quality of service that can not be satisfied on a private channel, it may turn to a common carrier paging system to meet this requirement.[42]

---

[37] We intended that the 600 paging unit standard would be applied to tone-voice paging units. We did not set a minimum for tone-only paging units.

[38] *Notice*, *supra*, note 1, at *para.* 53.

[39] No party provided any standards for on the air occupancy statistics as a substitute for pagers as a measure of channel loading.

[40] In the original *Notice*, we proposed that the Commission would select and assign paging channels according to fixed mileage separation standards. Therefore, we proposed to assign exclusive channels to applicants who would occupy the channel up to at least 70 percent of the loading standard adopted. We proposed a loading standard of 300 units for tone-voice paging, but we stated that we considered this figure to represent a minimal standard and sought comments on whether a higher standard, such as 500 tone-voice pagers, would be more appropriate. *Notice of Proposed Rule Making*, *supra*, note 1, at *para.*, 53.

[41] 47 U.S.C. 303(g).

[42] *First Report and Order supra*, note 3.

57. A major concern expressed in the comments was that without loading standards, too many licensees, as well as licensees with incompatible modes of operation (based on length of transmission time) would be assigned to the same channel resulting in an unacceptable quality of service. However, one of the primary objectives of frequency coordination, as the commentors themselves emphasize, is to maximize spectrum use. We will scrutinize channel selections based on our frequency coordination procedure in an effort to see that assignments adequately accommodate users. We emphasize that licensees will be responsible for cooperation in the selection and use of frequencies to reduce interference, and to make the most effective use of authorized spectrum.[43] Moreover, paging technology is changing so rapidly that the number of pagers that would be accommodated on a channel is likely to change often thereby requiring the Commission continually to re-examine paging loading standards.[44]

*Conclusion*

58. Accordingly, IT IS ORDERED, That pursuant to the authority found in Section 4(i), 301 and 303(r) of the Communications Act of 1934, as amended, (47 U.S.C. 154(i), 301, 303(r)), Part 90 of the Commission's Rules and Regulations IS AMENDED as specified in Appendix B. These amendments become EFFECTIVE 30 days after publication of the SECOND REPORT AND ORDER in the Federal Register. On that date we will begin to accept applications for the 900 MHz private paging channels allocated in this proceeding. Applicants should send their applications to the Commission's office in Gettysburg, Pennsylvania.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico *Secretary*

Appendix A not included—
may be seen in FCC Docket Branch

---

[43] This same sharing approach without loading standards is currently utilized for other frequency bands in the private spectrum. See 47 C.F.R. § 90.173.

[44] While we here decline to adopt specific channel loading standards to be applied to the private land mobile services addressed in this decision, channel loading for these services will be considered in any subsequent proceedings directed toward allocation of additional spectrum for these services. Specifically, in any proceedings addressing allocation to these services of spectrum which is available for future assignment to common carrier or to private land mobile services (the reserve pool), we will carefully compare realized channel loading on the private land mobile channels to the loading standards adopted for the common carrier services, to assure that users of common carrier services are not penalized by potential premature assignment of reserved pool channels to the private services should it develop that they are making less efficient use of the existing channels.

Appendix B

47 C.F.R. Part 90 is revised as follows:

1. A new Subpart P is added entitled "Paging Operations." Rule Sections 90.485 and 90.487 are moved to Subpart P and renumbered § 90.492 and § 90.490 respectively and amended to read as follows:

Subpart P—Paging Operations

§ 90.490 One-way paging operations in the private services.

(a) Subject to specific prohibition or restriction by rule provisions governing the radio service in which a licensee's radio system is authorized, paging operations are permitted:

(1) Where the signals and messages are transmitted by a control operator of the licensee stationed at a licensed control point in the licensee's system of communication.

(2) Where the signals and messages are transmitted from an operating position within an internal system of communication which meets the tests of §§ 90.471 through 90.475.

(3) Where the signals and messages are transmitted from a dispatch point within the licensee's system of communication, as defined at § 90.7.

(b) Systems employing dial-up circuits (§ 90.461(c)) may be used in one-way paging operations, but only where the paging signals are transmitted as provided at subparagraph (a)(1) of this section.

(c) Paging signals may not be transmitted from telephone positions in the public switched telephone network. This limitation, however, shall not be interpreted to bar access to paging transmitters through radio or wireline circuits provided under tariff by the telephone company or any other common carrier and equipped as a transmitter control circuit. This includes, among others, circuits which are integral parts of internal systems of communication; dial-up transmitter control circuits; and dispatch point circuits used in private radio systems. Paging signals may be originated from all such operating positions.

§ 90.492 One-way paging operations in the 806–821 MHz and 851–866 MHz bands.

Except as provided at §§ 90.387 and 90.645(e) of the rules for systems assigned channels on an exclusive basis, including SMR systems, systems of communication licensed in the 806–821 MHz and 851–866 MHz bands may not be emloyed for paging operations.

2. A new section 90.494 is added to read as follows:

§ 90.494 One-way paging operation in the 929–930 MHz band.

(a) The frequencies listed in the Table are available to all eligible Part 90 users for one-way paging systems on a shared basis only and will not be assigned for the exclusive use of any licensee. The provisions of § 90.173(b) apply to these frequencies.

Table

| *Frequency (Mhz)* | *Frequency (MHz)* |
|---|---|
| 929.0125 | 929.5125 |
| .0375 | .5375 |
| .0625 | .5625 |
| .0875 | .5875 |
| .1125 | .6125 |
| .1375 | .6375 |
| .1625 | .6625 |
| .1875 | .6875 |
| .2125 | .7125 |
| .2375 | .7375 |
| .2625 | .7625 |
| .2875 | .7875 |
| .3125 | .8125 |
| .3375 | .8375 |
| .3625 | .8625 |
| .3875 | .8875 |
| .4125 | .9125 |
| .4375 | .9375 |
| .4625 | .9625 |
| 929.4875 | 929.9875 |

*Frequencies 929.0125 through 929.7375 are available for shared use by all eligible Part 90 users except those eligible as private carrier paging (PCP) licensees.*

*Frequencies 929.7625 through 929.9875 are available only for shared use by private carrier paging (PCP) licensees.*

*Frequencies 929.7625 and 929.9875 are available only for shared use in multi-area paging systems by private carrier paging (PCP) licensees.*

*Frequencies 929.2625 and 929.4875 are available only for shared use in multi-area paging systems for all Part 90 users except private carrier paging (PCP) licensees.*

*(b) All applicants for these frequencies must comply with frequency coordination requirements of § 90.175(g).*

*(c) Licensees on these frequencies may utilize any type of paging operation desired (tone only, tone-voice, digital, tactile, optical readout, etc.).*

*(d) Applicants requesting a multi-area paging frequency (929.2625, 929.4875, 929.7625, or 929.9875 MHz) must operate paging systems on this frequency in at least three separate geographical areas within eight months of the date of authorization. If at the end of eight months, systems have not been constructed in three separate geographical areas, authorization cancels automatically. An applicant authorized for multi-area service may also provide local service on this frequency in the authorized areas.*

*(e) There shall be no minimum or maximum loading standards for these frequencies.*

*(f) The effective radiated power and antenna height for base stations providing one-way paging service in the frequency band 929–930 MHz must not exceed 1*

*kilowatt (30 dBw) and 1000 feet above average terrain (AAT), or the equivalent thereof determined from the following table:*

| *Antenna Height (AAT) (feet)* | *Effective Radiated Power (ERP) (watts)* |
|---|---|
| Above 5000 | 65 |
| 4501–5000 | 65 |
| 4001–4500 | 70 |
| 3501–4000 | 75 |
| 3001–3500 | 100 |
| 2501–3000 | 140 |
| 2001–2500 | 200 |
| 1501–2000 | 350 |
| 1001–1500 | 600 |

3. In Section 90.7 the following definition is added.

§ 90.7 Definitions

* * * * *

Mobile station ***

Paging. A one-way communications service from a base station to mobile or fixed receivers that provided signaling or information transfer by such means as tone, tone-voice, tactile, optical readout, etc.

4. In Section 90.175, subparagraph (e)(2) is revised, (e)(8) is deleted, and a new subparagraph (g) is added as follows:

§ 90.175 Frequency coordination requirements

* * * * *

(e)(2) Applications in the Special Emergency Radio Service, except as required by §§ 90.53(b)(8), 90.267, and 90.175(g).

(e)(8) [Reserved]

* * * * *

(g) For frequencies in the 929–930 MHz band

(1) A report based on a field study indicating the degree of probable interference to all existing co-channel stations within 120 km (75 mi.) of the proposed stations, together with a statement that all such co-channel licensees have been notified of the applicant's intention to apply; or

(2) A statement from a frequency coordinating committee recommending the frequency which, in the opinion of the committee, will result in the least amount of interference to all existing stations operating in the particular area. The Committee's recommendations may include comments on technical factors such as power, antenna height and gain, terrain, and other factors which may serve to mitigate any contemplated interference. The frequency advisory committee must be so organized that it is representative of all persons who are eligible for radio facilities in the service concerned in the area the committee purports to serve. The functions of such committees are purely advisory in character, and their recommendations are not binding upon either the applicant or the Commission.

5. The Table in Section 90.205(b) is amended as follows:

§ 90.205 Power

* * * * *

(b) Except where otherwise specifically provided the maximum power that will be authorized is as follows:

| *Frequency range (megahertz)* | *Maximum output power (watts)* | *Maximum effective radiated power (watts)* |
|---|---|---|
| * * * | * * | |
| 806 to 821 | (6) | (6) |
| 851 to 866 | (7) | (6) |
| 929 to 930 | (7) | (9) |
| 1427 to 1435 | (2) | ..... |
| 2450 to 2500 | 5 | ..... |
| * * * | * * | |

* * * * *

(9) As specified in § 90.494(f).

6. Section 90.209(g) is amended as follows:

§ 90.209

* * * * *

(g) For transmitters that operate in the frequency bands 450–512 MHz, 806–821 MHz, 851–866 MHz and 929–930 MHz and are not equipped with an audio low-pass filter in accordance with the provisions of Section 90.211(d)(1), the power of any emission shall be attenuated below the unmodulated carrier power (P) in accordance with the following schedule:

(1) ***

* * * * *

7. Section 90.211(d)(1)(ii) is amended as follows:

§ 90.211 Modulation requirements

* * * * *

(ii) For transmitters that operate in the frequency band of 450 to 470 MHz and authorized on or after November 1, 1967, and transmitters that operate in the frequency bands of 470 to 512 MHz, 806 to 821 MHz, 851 to 866 MHz, 929 to 930 Mhz, and Traveler's Information Stations on 530 and 1610 kHz, the attenuation of the low-pass filter between the frequencies of 3 kHz and 20 kHz shall be greater than the attenuation at 1 kHz by at least: 60 $\text{Log}_{10}$ (f/3) decibels where "f" is the frequency in kHz. At frequencies above 20 kHz, the attenuation shall be 50 decibels greater than the attenuation at 1 kHz.

8. The table in Section 90.213(a) is amended and new limitation (14) is added as follows:

§ 90.213 Frequency tolerance

(a) A licensee in the services governed by this part shall maintain the carrier frequency of each authorized transmitter within the following percentage of the assigned frequency:

*Frequency Tolerance*

| Frequency range (MHz) | Fixed and base stations | | Mobile stations | |
|---|---|---|---|---|
| | Over 200W output power | 200W or less output power | Over 2W output power | 2W or less output power |
| Below 25 | [133].005 | .01 | .01 | .02 |
| 25 to 50 | .002 | .002 | .002 | .005 |
| 50 to 450 | [45].0005 | [45].0005 | [4].0005 | [6].005 |
| 450 to 470 | [7].00025 | [789].00025 | .0005 | .0005 |
| 470 to 512 | [10].00015 | [7].00025 | .0005 | .0005 |
| 806 to 821 | .00015 | [10].00015 | .00025 | .00025 |
| 851 to 866 | .00015 | .00015 | .00025 | .00025 |
| 929 to 930 | [11].03 | .00015 | ([14]) | ([14]) |
| 1427 to 1435 | ([12 13]) | [11].03 | .03 | .03 |
| Above 2450 | | ([12 13]) | ([12 13]) | ([12 13]) |

* * * * *

(14) Mobile units will not be authorized in this band.

9. The table of frequencies in Section 90.555(a) is amended as follows:

§ 90.555 Combined frequency listing

* * * * *

| *Frequency* | *Service* | *Special limitations* |
|---|---|---|
| * | * | * |
| 851–866 | All services | Base or Mobile |
| 929–930 | All services exc. IR | Base only One-Way Paging |
| 1427–1435 | All services exc. IR | Base, Mobile, or Fixed. |
| * | * | * |

10. The Table of Frequencies in Section 90.17(b) is amended and new limitation (26) is added as follows:

§ 90.17 Local Government Radio Service

* * * * *

(b) Frequencies available ***

| *Frequency or band* | *Class of station(s)* | *Limitations* |
|---|---|---|
| * * * * * | | |
| 851–866 | Base or mobile | 15 |
| 929–930 | Base only | 26 |
| * * * * * | | |

(c) ***

* * * * *

(26) Frequencies in this band are available only for one-way paging operations in accordance with Section 90.494.

11. The Table of Frequencies in Section 90.19(d) is amended and new limitation (27) is added as follows:

§ 90.19 Police Radio Service

* * * * *

(d) Frequencies available ***

| *Frequency or band* | *Class of station(s)* | *Limitations* |
|---|---|---|
| 851–866 | Base or mobile | 22 |
| 929–930 | Base only | 27 |

* * * * *

(e) ***

* * * * *

(27) Frequencies in this band are available only for one-way paging operations in accordance with Section 90.494.

12. The Table of Frequencies in Section 90.21(b) is amended and new limitation (15) is added as follows:

§ 90.21 Fire Radio Service

* * * * *

(b) Frequencies available ***

| *Frequency or band* | *Class of station(s)* | *Limitations* |
|---|---|---|
| * * * * * | | |
| 851–866 | Base or mobile | 10 |
| 929–930 | Base only | 15 |
| * * * * * | | |

(c) ***

* * * * *

(15) Frequencies in this band are available only for one-way paging operations in accordance with Section 90.494.

13. The Table of Frequencies in Section 90.23(b) is amended and new limitation (16) is added as follows:

§ 90.23 Highway Maintenance Radio Service

* * * * *

(b) Frequencies available ***

| *Frequency or band* | *Class of station(s)* | *Limitations* |
|---|---|---|
| * | * | * |
| 851–866 | Base or mobile | 10 |
| 929–930 | Base only | 16 |
| * | * | * |

(c) ***

* * * * *

(16) Frequencies in this band are available only for one-way paging operations in accordance with Section 90.494.

14. The Table of Frequencies in Section 90.25(b) is amended and new limitation (21) is added as follows:

§ 90.25 Forestry Conservation Radio Service

* * * * *

(b) Frequencies available ***

| *Frequency or band* | *Class of station(s)* | *Limitations* |
|---|---|---|
| * | * | * |
| 851–866 | Base or mobile | 10 |
| 929–930 | Base only | 16 |
| * | * | * |

(c) ***

* * * * *

(21) Frequencies in this band are available only for one-way paging operations in accordance with Section 90.494.

15. The Table of Frequencies in Section 90.53(a) is amended and new limitation (31) is added as follows:

§ 90.53 Frequencies available

(a) ***

Special Emergency Radio Service Frequency Table

| *Frequency or band* | *Class of station(s)* | *Limitations* |
|---|---|---|
| * * * * * | | |
| 851–866 | Base or mobile | 21 |
| 929–930 | Base only | 31 |
| * * * * * | | |

(31) Frequencies in this band are available only for one-way paging operations in accordance with Section 90.494.

16. The Table of Frequencies in Section 90.63(c) is amended and new limitation (25) is added as follows:

§ 90.63 Power Radio Service

* * * * *

(c) Frequencies available ***

| *Frequency or band* | *Class of station(s)* | *Limitations* |
|---|---|---|
| * * * * * | | |
| 851–866 | Base or mobile | 17 |
| 929–930 | Base only | 25 |
| * * * * * | | |

(d) ***

* * * * *

(25) Frequencies in this band are available only for one-way paging operations in accordance with Section 90.494.

17. The Table of Frequencies in Section 90.65(b) is amended and new limitation (42) is added as follows:

§ 90.65 Petroleum Radio Service

* * * * *

(b) Frequencies available***

| *Frequency or band* | *Class of station(s)* | *Limitations* |
|---|---|---|
| * * * * * | | |
| 851–866 | Base or mobile | 30 |
| 929–930 | Base only | 42 |
| * * * * * | | |

(c) ***

* * * * *

(42) Frequencies in this band are available only for one-way paging operations in accordance with Section 90.494.

18. The Table of Frequencies in Section 90.67(c) is amended and new limitation (35) is added as follows:

§ 90.67 Forest Products Radio Service

* * * * *

(b) Frequencies available ***

| *Frequency or band* | *Class of station(s)* | *Limitations* |
|---|---|---|
| * | * | * |
| 851–866 | Base or mobile | 20 |
| 929–930 | Base only | 35 |
| * | * | * |

(c) ***

* * * * *

(35) Frequencies in this band are available only for one-way paging operations in accordance with Section 90.494.

19. The Table of Frequencies in Section 90.69(b) is amended and new limitation (10) is added as follows:

§ 90.69 Motion Picture Radio Service

* * * * *

(b) Frequencies available ***

| *Frequency or band* | *Class of station(s)* | *Limitations* |
|---|---|---|
| * | * | * |
| 851–866 | Base or mobile | 5 |
| 929–930 | Base only | 10 |
| * | * | * |

(c) ***

* * * * *

(10) Frequencies in this band are available only for one-way paging operations in accordance with Section 90.494.

20. The Table of Frequencies in Section 90.71(b) is amended and new limitation (4) is added as follows:

§ 90.71 Relay Press Radio Service

* * * * *

(b) Frequencies available ***

| *Frequency or band* | *Class of station(s)* | *Limitations* |
|---|---|---|
| * * * * * | | |
| 851–866 | Base or mobile | 3 |
| 929–930 | Base only | 4 |
| * * * * * | | |

(c) ***

* * * * *

(4) Frequencies in this band are available only for one-way paging operations in accordance with Section 90.494.

21. The Table of Frequencies in Section 90.73(c) is amended and new limitation (36) is added as follows:

§ 90.73 Special Industrial Radio Service

* * * * *

(c) Frequencies available ***

| *Frequency or band* | *Class of station(s)* | *Limitations* |
|---|---|---|
| * * * * * | | |
| 851–866 | Base or mobile | 21 |
| 929–930 | Base only | 36 |
| * * * * * | | |

(d) ***

* * * * *

(36) Frequencies in this band are available only for one-way paging operations in accordance with Section 90.494.

22. The Table of Frequencies in Section 90.75(b) is amended and new limitation (42) is added as follows:

§ 90.75 Business Radio Service

* * * * *

(b) Frequencies available ***

| *Frequency or band* | *Class of station(s)* | *Limitations* |
|---|---|---|
| * * * * * | | |
| 851–866 | Base or mobile | 33 |
| 929–930 | Base only | 42 |
| * * * * * | | |

(c) ***

* * * * *

(42) Frequencies in this band are available only for one-way paging operations in accordance with Section 90.494.

23. The Table of Frequencies in Section 90.79(c) is amended and new limitation (24) is added as follows:

§ 90.79 Manufacturers Radio Service

* * * * *

(c) Frequencies available ***

| *Frequency or band* | *Class of station(s)* | *Limitations* |
|---|---|---|
| * | * | * |
| 851–866 | Base or mobile | 15 |
| 929–930 | Base only | 24 |
| * | * | * |

(d) ***

* * * * *

(24) Frequencies in this band are available only for one-way paging operations in accordance with Section 90.494.

24. The Table of Frequencies in Section 90.81(c) is amended and new limitation (12) is added as follows:

§ 90.81 Telephone Maintenance Radio Service

* * * * *

(c) Frequencies available ***

| *Frequency or band* | *Class of station(s)* | *Limitations* |
|---|---|---|
| * | * | * |
| 851–866 | Base or mobile | 7 |
| 929–930 | Base only | 12 |
| * | * | * |

(d) ***

* * * * *

(12) Frequencies in this band are available only for one-way paging operations in accordance with Section 90.494.

25. The Table of Frequencies in Section 90.89(b) is amended and new limitation (18) is added as follows:

§ 90.89 Motor Carrier Radio Service

* * * * *

(b) Frequencies available ***

| *Frequency or band* | *Class of station(s)* | *Limitations* |
|---|---|---|
| * * * * * | | |
| 851–866 | Base or mobile | 12 |
| 929–930 | Base only | 18 |
| * * * * * | | |

(c) ***

(18) Frequencies in this band are available only for one-way paging operations in accordance with Section 90.494.

26. The Table of Frequencies in Section 90.91(b) is amended and new limitation (19) is added as follows:

§ 90.91 Railroad Radio Service

* * * * *

(b) Frequencies available ***

| *Frequency or band* | *Class of station(s)* | *Limitations* |
|---|---|---|
| * * * * * | | |
| 851–866 | Base or mobile | 13 |
| 929–930 | Base only | 19 |
| * * * * * | | |

(c) ***

* * * * *

(19) Frequencies in this band are available only for one-way paging operations in accordance with Section 90.494.

27. The Table of Frequencies in Section 90.93(b) is amended and new limitation (13) is added as follows:

§ 90.93 Taxicab Radio Service

* * * * *

(b) Frequencies available ***

| *Frequency or band* | *Class of station(s)* | *Limitations* |
|---|---|---|
| * * * * * | | |
| 851–866 | Base or mobile | 5 |
| 929–930 | Base only | 13 |
| * * * * * | | |

(c) ***

* * * * *

(13) Frequencies in this band are available only for one-way paging operations in accordance with Section 90.494.

28. The Table of Frequencies in Section 90.95(c) is amended and new limitation (15) is added as follows:

§ 90.95 Automobile Emergency Radio Service

* * * * *

(c) Frequencies available***

| *Frequency or band* | *Class of station(s)* | *Limitation* |
|---|---|---|
| * | * * * * | |
| 851–866 | Base or mobile | 10 |
| 929–930 | Base only | 15 |
| * | * * * * | |

(d) ***

* * * * *

(15) Frequencies in this band are available only for one-way paging operations in accordance with Section 90.494.

Domestic Public Land Mobile Radio Service
Domestic Public Land Mobile Radio Service, Need For
Petition to Deny
Stay

Commission affirms staff's findings that applicant for additional transmitter locations for existing DPLMRS facility demonstrated adequate public need and site availability. Motion for Stay denied. —*Phone Depots, Inc.*

FCC 82–447

**BEFORE THE**

# FEDERAL COMMUNICATIONS COMMISSION

**WASHINGTON, D.C. 20554**

| | |
|---|---|
| In re Application of<br><br>PHONE DEPOTS INC. d/b/a<br>MOBILFONE RADIO SYSTEM<br><br>For a Construction Permit for additional transmitter locations for Station KEA254 to operate on frequency 152.21 MHz at Spring Valley and Mahopac, New York, in the Domestic Public Land Mobile Radio Service | File No.<br>21634–CD–<br>P–(2)–80 |

MEMORANDUM OPINION AND ORDER

Adopted October 13, 1982; Released October 18, 1982

BY THE COMMISSION:

1. Presently before the Commission is an Application for Review filed by Interelectronics Corporation (IC) and an Opposition, filed by Phone Depots, Inc. d/b/a Mobilfone Radio System (Mobilfone). IC requests that we review the *Memorandum Opinion and Order* (MO&O), Mimeo 003753, released October 2, 1981, in which the Common Carrier Bureau (the Bureau), pursuant to delegated authority, granted the captioned application of Mobilfone and denied IC's "Petition to Deny or in the Alternative to Hold in Abeyance." Also before us is IC's Motion for Stay of the MO&O and Mobilfone's Opposition.

2. Mobilfone operates existing Station KEA254 from various transmitter locations in the New York City metropolitan area. In its MO&O, the Bureau found that the two additional transmitter locations requested by Mobilfone in this proceeding were for "full-in" locations because the reliable service contours of the proposed locations overlapped the reliable service contours of existing transmitter locations for the same facility by more than fifty percent. The Bureau further found that Mobilfone had demonstrated sufficient public need for these "fill-in" locations.

3. IC claims that the Bureau erred in evaluating Mobilfone's application under the fifty percent overlap "fill-in" policy referred to above. According to IC, this policy was not in effect when Mobilfone's application was filed on May 6, 1980, but was first developed in our *Further Notice of Proposed Rulemaking* in CC Docket 20870, 84 FCC 2d 857, 864, at n. 8 (1981), which became effective on June 1, 1981. IC also asserts that the Bureau's failure to dismiss Mobilfone's application under Section 22.516 of our Rules[1] was contrary to *Long Island Paging*, 30 FCC 2d 405, *aff'd*, 32 FCC 2d 235 (1971), and *Houston Mobilfone, Inc.*, 65 FCC 2d 848 (Rev. Bd. 1977), *review denied*, FCC 78–477, released July 11, 1978,[2] and that Mobilfone's application did not contain enough specific information as to how its proposal would serve the public interest to justify the Bureau's grant.

4. We find these arguments to be without merit.[3] In numerous cases decided prior to our *Further Notice of Proposed Rulemaking* in CC Docket 20870, *supra*, we have, where the public interest was served, allowed mobile radio carriers to improve and expand their service to the public by authorizing additional transmitter locations without requiring a rigorous and detailed showing of public need. *See RAM Broadcasting of Texas, Inc.*, 52 FCC 2d 697, 699 (1975), and cases cited therein. Although this policy has not always been specifically referred to as a "fill-in" policy, the Bureau has applied it in cases decided prior to June 1, 1981, involving varying degrees of overlap between proposed and existing service contours, including fifty percent overlap.[4] We find that the Bureau correctly

---

[1] 47 C.F.R. § 22.516 requires applicants in the Domestic Public Land Mobile Radio Service who request assignment of an additional channel to an existing station to submit a traffic loading study.

[2] *Rev'd and remanded mem. sub nom.* Mobilfone Service Inc. v. FCC, No. 78–1686, (D.C. Cir. September 27, 1979). These cases stated that public need for mobile radio service would not be presumed. However, we have since eliminated the requirement that applicants for one initial mobile radio channel to serve a new area demonstrate need. CC Docket No. 20870, FCC 82–207, 47 Fed. Reg. 21551, May 19, 1982; General Docket No. 80–183, FCC 82–202, 47 Fed. Reg. 24557, June 7, 1982.

[3] Relying on 47 C.F.R. § 1.115(c), Mobilfone claims that IC's argument regarding the fifty percent overlap "fill-in" policy was not made below and is not properly before the Commission for review. While Mobilfone is technically correct, we have nevertheless examined IC's argument to amplify on Commission policy.

[4] *E.g.*, Salinas Valley Radio Telephone Company, Mimeo 07782, released March 9, 1981; Empire Paging Corporation, Mimeo 07020, released February 17, 1981; Commonwealth Telephone Company, Mimeo 07525, released March 3, 1981, *aff'd*, 88 FCC 2d 782 (1981); Radiocall, Inc., Mimeo 13114, released March 7, 1979 (45 RR 2d 228). *See also* the Bureau's Public Notice, "Clarification of Existing Policy," Mimeo 002411, July 27, 1981.

considered Mobilfone's application under these standards. In addition, a Section 22.516 traffic loading study is not required where, as here, the applicant requests additional locations on its existing frequency.[5] Finally, we find that Exhibit 4 to Mobilfone's application supplied sufficient information regarding the needs of Mobilfone's existing subscribers to show how its "fill-in" proposal would serve the public interest consistent with our frequency allocation plan set forth in Rules Section 22.501.[6] For these reasons, we affirm the Bureau's finding that Mobilfone demonstrated sufficient public need for these facilities.

5. IC's Petition to Deny claimed that Mobilfone had failed to demonstrate site availability for these facilities. The Bureau's MO&O, without discussion, found otherwise. IC now argues that Section 309(d)(2) of the Communications Act of 1934, as amended,[7] required a full statement of reasons for denying this allegation. We disagree. That section of the Act requires the Commission to dispose of all "substantial issues" raised by a petition to deny. IC's argument regarding site availability was trivial and failed to raise a "substantial issue." *See Buffalo Valley Telephone Company*, FCC 82–217, released May 19, 1982. Accordingly, the Bureau did not err in finding, without further explanation, that Mobilfone had demonstrated site availability. For the reasons stated above, IC's Application for Review is denied.

*Motion for Stay*

6. IC has also separately requested the Commission to stay the effectiveness of the Bureau's MO&O pending action on its Application for Review. IC's request failed to discuss and does not satisfy the criteria for a stay established in *Virginia Petroleum Jobbers Association v. FPC*, 259 F. 2d 921 (D.C. Cir. 1958), *modified in Washington Metropolitan Area Transmit Commission v. Holiday Tours, Inc.*, 559 F. 2d 841 (D.C. Cir. 1977). Moreover, based on our action today, a stay is not warranted. Therefore, IC's request for stay is denied.

7. Accordingly, IT IS ORDERED, That the Application for Review and the Motion for Stay filed by Interelectronics Corporation in File No. 21634–CD–P–80 ARE DENIED, and that the decision of the Common Carrier Bureau in Phone Depots, Inc. d/b/a Mobilfone Radio System, Mimeo 003753, released October 2, 1981, IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico *Secretary*

---

[5] *See* n. 2, *supra*. Furthermore, in Mobilfone, Inc., Mimeo 06706, released February 6, 1981, the Bureau specifically noted that a Section 22.516 showing is not required in support of a "fill-in" proposal.

[6] 47 C.F.R. § 22.501.

[7] 47 U.S.C. § 309(d)(2).

Employment, Equal Opportunity Rule, Compliance Ordered
Petition to Deny
Programming Past

Licensed renewal application granted subject to EEO reporting conditions. Petition to deny dismissed as untimely and treated as informal objection. No substantial and material question of fact was raised regarding licensee's past programming.
—*Provident B/Cing Company*

FCC 82–473

**BEFORE THE**

# FEDERAL COMMUNICATIONS COMMISSION

**WASHINGTON, D.C. 20554**

| | |
|---|---|
| In re Application of<br><br>PROVIDENT BROADCASTING COMPANY<br><br>For Renewal of License of Station WQCK(FM)<br>Manchester, Georgia | File No.<br>BRH–811201J7 |

MEMORANDUM OPINION AND ORDER

Adopted: October 28, 1982; Released: November 4, 1982

BY THE COMMISSION: COMMISSIONER RIVERA ABSENT.

1. The Commission has before it for consideration: (a) the above-captioned application of Provident Broadcasting Company (PBC) for renewal of license of Station WQCK(FM), Manchester, Georgia; (b) a petition to deny that application filed March 2, 1982, by the East Central Alabama—West Central Georgia Minority Christian Broadcast Coalition (Coalition);[1] (c) licensee's opposition thereto filed April 2, 1982.[2]

[1] The Coalition states it is a voluntary organization based in Manchester, Georgia, and that it was formed in December, 1981 to meet a need for more minority public service and more minority hiring by the local electronic media.

[2] On May 20, 1982, licensee supplemented its opposition to reflect the fact that on May 2, 1982, WQCK(FM) commenced broadcasting a one hour weekly gospel program.

2. Petitions to deny the WQCK(FM) renewal application were due by March 1, 1982. As noted above, the Coalition filed its petition on March 2, 1982, one day late. Thus, it is untimely, and must be dismissed as a petition to deny. However, we shall consider the petition as an informal objection pursuant to Section 73.3587 of the Commission's Rules, and the allegations therein shall be given full consideration.

3. The Coalition alleges that on December 20, 1981, PBC discontinued Black programming on Sunday mornings, and that on January 6, 1982, it cancelled a Sunday evening Black gospel program and fired the announcer "for unknown reasons."[3] Further, the Coalition claims that licensee has not actively sought minorities for on-air positions. In addition, the Coalition alleges that in its renewal application PBC misrepresented its efforts to hire minorities and used questionable statistics with respect to the labor force availability of minorities, in that PBC's EEO program labor force data does not correspond with data for Meriwether County, Georgia, WQCK(FM)'s county of license. The Coalition also faults PBC for listing the Georgia Rehabilitation Center as a source of minority referrals. Finally, the Coalition faults licensee for failing to place a letter allegedly regarding the operation of the station in the WQCK(FM) public file.

4. In opposition, licensee acknowledges that it discontinued both programs. However, in regard to the Sunday program, licensee explains that it was replaced with a series of short religious programs in an effort to provide an outlet for various religious disciplines, and that one preacher presently broadcast on Sunday mornings is Black. With regard to the evening program, PBC explains that it fired the producer/announcer of the program because he allegedly withheld from the station money which he had received from a sponsor, after having been warned previously about "other unacceptable practices." Since it had no replacement for him, the program was terminated. Although PBC acknowledges that Mr. Michael Ellison, on behalf of the Coalition, protested the discontinuation of both programs, licensee alleges it told Mr. Ellison that if anyone would produce the type of program he was interested in, WQCK(FM) would broadcast it. With regard to its EEO program, licensee asserts that it did not misrepresent either local labor force data or its recruitment efforts. Licensee states that as a Class C FM facility,[4] Station WQCK(FM) serves a seven county area in west-central Georgia and that the employment

---

[3] By way of background, the Coalition states that on November 1, 1980, the previous licensee changed the format of WFDR-FM (as WQCK(FM) was then identified) from a Black format to a "live uncanned country format." However, the Coalition claims that licensee retained the station's Black programs and its minority employees. Nevertheless, the Coalition notes that all Blacks except the gospel announcer have left the station.

[4] A Class C station is a station operating on a Class B–C channel in Zone II. It is designed to render service to a community and a large surrounding area. 47 C.F.R. § 73.206(b)(4).

statistics used accurately reflect the labor force percentages of women (44.7%) and minorities (28.8%) in those counties.[5] Further, licensee states that it used the Georgia Rehabilitation Center as a source of referrals because it believed the handicapped are a minority which is often discriminated against and because the Center was listed by PBC as one of the sources of referrals in its application to acquire WQCK(FM). (File No. BALH–810716HQ, granted August 14, 1981). Licensee also disputes the Coalition's charges regarding its efforts to hire minorities as well as its employment statistics. PBC states that since it acquired WQCK(FM) in mid-August, 1981, it hired ten persons for full-time work, including two Blacks, both hired as salespersons. Moreover, with regard to its current profile, licensee notes that one of the two Blacks hired voluntarily resigned. Licensee states tht WQCK(FM) had been licensed to a debtor-in-possession following the former licensee's bankruptcy and had suffered a loss of trained personnel. Therefore, PBC contends that it did not have the luxury either of an extended recruitment period or of training inexperienced applicants, and that, consequently, it initially sought only experienced personnel. PBC concludes that it did comply with the Commission's EEO requirements. Finally, PBC acknowledges that it received two letters signed by Mr. Ellison. It states that the first was a complaint regarding WQCK(FM)'s termination of the Sunday morning gospel program and that it was placed in the station's public file. However, it contends the second letter was a confirmation of a meeting between WQCK(FM)'s general manager and Mr. Ellison regarding the station's rates. PBC concedes that the second letter may not have been placed in the station's public file, but it argues that the letter was a business inquiry from a potential sponsor and not a comment about the operation of WQCK(FM).

5. In order to raise a substantial and material question of fact concerning a licensee's past programming, a petitioner must plead specific allegations of fact which, if true, would establish that the licensee's overall programing could not reasonably have met the needs and interests of the people within its service area, including the Black community. *Taft Broadcasting Company,* 38 FCC 2d 770, 789 (1973); *RadiOhio, Inc.*, 38 FCC 2d 721 (1973), aff'd *sub nom. Columbus Broadcasting Coalition v. F.C.C.*, 505 F. 2d 320 (D.C. Cir. 1974). In that regard, the Coalition does no more than assert that it disagrees with two of PBC's programming decisions. In contrast, PBC's explanation regarding the Sunday morning program indicates that the needs of several groups, including Blacks, are being addressed by the series of shorter religious programs, while its explanation regarding the termination of the Sunday evening program

[5] The counties listed by licensee include: Meriwether, Heard, Troup, Muscogee, Harris, Talbot, and Upson—all located in Georgia.

clearly shows that PBC's action was not racially motivated. Thus, the Coalition has failed to demonstrate that that PBC's overall past programming could not reasonably have met the needs and interests of the people within its service area. Accordingly, no further Commission action is warranted.

6. Figures supplied by the Georgia Department of Labor's "Labor Resource Information for Affirmative Action Programs (1981)" indicate that the labor force in Meriwether County, Georgia[6] includes 41.7% women, 43.2% Blacks, and .3% Hispanics. An examination of the WQCK(FM) employment profile as shown in its EEO program discloses that one of twelve (8.3%) full-time employees is a minority while one of nine (11.1%) employees in the upper-four job categories is a minority. Thus, minority representation on the licensee's staff is not within the Commission's processing guidelines,[7] either overall or in upper-four category jobs. Moreover, we note that WQCK(FM)'s 1982 annual employment report, FCC Form 395, filed subsequent to its renewal application on June 1, 1982, reveals a workforce of 17 full-time employees, one (5.9%) of whom is a minority, and 15 full-time upper-four employees, including one (6.7%) minority. We note that licensee has operated the station only since August, 1981, and that between August, 1981 and December, 1981, it hired ten persons for full-time positions, including two Blacks, one of whom subsequently resigned. However, it apparently did not hire any minorities between December, 1981, and February 21, 1982, even though it

---

[6] PBC seeks to have its record viewed in light of labor force data from seven counties in west-central Georgia on the ground that those counties are served by WQCK(FM). As a general rule, however, the Commission has stated that licensees not located within a Standard Metropolitan Statistical Area (SMSA) are to use labor force statistics of their community or county of license as an initial frame of reference. *North Myrtle Beach Broadcasting Corp.*, 71 FCC 2d 602 (1979). Further, where such data is available, a party seeking to use alternative data must provide substantial justification for doing so. *Cf. Chicago Metropolitan Area License Renewals*, 89 FCC 2d 1031 (1982) (and cases cited therein). In this regard, the licensee's inclusion of Heard and Muscogee counties (neither of which borders Meriwether County) and its exclusion of Coweta, Spaulding, and Pike counties (all of which border on Meriwether County) have not been explained. Thus, although factors may exist which would make it appropriate to include labor force data for counties in addition to Meriwether County, we do not believe that the licensee has provided sufficient justification for its choice of labor force data. *North Myrtle Beach Broadcasting Corp., supra.* Accordingly, we must conclude that Meriwether County labor force statistics should be utilized in judging the reasonableness of PBC's EEO efforts.

[7] By Public Notice No. 14932, dated March 10, 1977, the Commission established processing guidelines for routine evaluation of license renewal applications whereby an in-depth review would be conducted of the EEO program of any station with more than 10 full-time employees whose minority or female employment did not reflect at least 50 percent of their percentage in the available labor force overall and 25 percent in the upper-four job categories. By Public Notice, FCC 80–61, dated February 13, 1980, this processing criteria was extended to stations with 5 to 10 full-time employees. Further, the Commission revised the processing criteria for the upper-four job categories to 50 percent for stations with 11 or more full-time employees. Thus, for WQCK(FM), the applicable processing guidelines are 21.8% for minorities for both overall and upper-four jobs. In this regard, we note that even if we had used the labor force data proffered by PBC, its employment of minorities would still not be within our processing guidelines.

added at least five full-time employees during that period. Further, while licensee has received referrals from the Georgia State Employment Service and the S.E. Skills Center and has placed newspaper advertisements in search of job applicants, its explanation of its hiring strategy following its takeover of the station, its supposed recruitment area, and its failure to list any organizations specializing in minority referrals causes us concern about its efforts to seek out minorities.[8] Accordingly, we believe it necessary to monitor more closely licensee's efforts to hire and recruit minorities, and we will therefore impose reporting conditions.[9]

7. Finally, the Coalition's complaint concerning the absence of a letter from WQCK(FM)'s public file raises no substantial and material question of fact. Section 73.3526 of the Commission's Rules requires that particular records—including certain letters from the public—be kept available for public inspection at the station. Section 73.1202(e) of the rules specifies further that the letters to be retained include "[a]ll written comments and suggestions received from the public regarding operation of the station. . . ." In view of the licensee's explanation of the contents of the missing letter and the circumstances surrounding its sending, we find that the letter was neither a comment nor a suggestion regarding the operation of the station but was an inquiry into the station's charges for the presentation of programming to be produced or obtained by the Coalition. Accordingly, the letter does not come within the ambit of Section 73.1202(e), and its absence from the public file raises no question about licensee's qualifications.

8. Having considered all matters before us, we find that none of the matters raises a substantial and material question of fact,[10] and that grant of the WQCK(FM) renewal application for the 1982–1989 license term would serve the public interest, convenience, and necessity. However, as indicated above, reporting conditions will be imposed in order to monitor the licensee's EEO efforts.

---

[8] Although licensee's reasons for seeking out the handicapped are laudable and in no way contrary to our rules, licensee is required to ensure that its EEO program includes minorities. Thus, licensee should develop referral sources which could reasonably be expected to produce minority job applicants.

[9] While licensee's EEO performance requires the imposition of reporting conditions, petitioner's complaint that licensee has not actively sought minorities for "on-air positions" is without merit. The Commission has consistently held that it will not look into the presence or absence of protected groups within a single job category. *General Electric Broadcasting Company, Inc.*, 43 RR 2d 540 (1978).

[10] In addition to seeking designation of the WQCK(FM) renewal application, the Coalition requests oral argument before the full Commission. However, no reason is given to support this request, and we do not perceive how resolution of the Coalition's allegations would be aided by oral argument. Accordingly, we deny the Coalition's request for oral argument. The Coalition also seeks permission to amend its petition at a later date claiming that more time might reveal further questions or additional support for the allegations contained in the petition. However, this assertion is speculative, and there is nothing before us to suggest that additional time will result in any relevant information. Accordingly, the Coalition's request is denied.

9. Accordingly, IT IS ORDERED, That the petition to deny filed by the East Central Alabama—West Central Georgia Minority Christian Broadcast Coalition on March 2, 1982, IS DISMISSED, and the petition, when treated as an informal objection, IS DENIED.

10. IT IS FURTHER ORDERED, That the application for renewal of license for Station WQCK(FM), Manchester, Georgia, IS GRANTED to April 1, 1989, subject to its filing within thirty (30) days of the release of this Order a revised EEO program which specifies recruitment sources specializing in minority referrals, and subject to EEO conditions specified herein. In that regard, the licensee is directed to submit the following information on an annual basis commencing on December 1, 1983, and continuing for two years thereafter, with the final report being filed on December 1, 1985:[11]

(a) a list of all persons hired during the preceding year indicating their referral or recruitment source, job title, part-time or full-time status, date of hire, sex and race or national origin;

(b) a list of employees as of the most recent payroll period prior to each filing date, by job title with part-time or full-time status indicated (ranked from the highest paid to the lowest paid), date of hire, sex and race or national origin;

(c) an additional listing of the race or national origin, sex and recruitment source of each person who applies for each staff position that opens during each period; and

(d) a narrative statement detailing the station's efforts to recruit for each position filled during the specified periods, including the identification of sources used for the purpose of increasing the station's pool of minority applicants.[12]

11. IT IS FURTHER ORDERED, That the Broadcast Bureau send a copy of this Memorandum Opinion and Order by Certified Mail—Return Receipt Requested to each of the parties to this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico *Secretary*

---

[11] Upon submission of the December 1, 1985 report, the Commission shall review the licensee's EEO performance. If we determine that the licensee has developed an effective EEO program, no further reports shall be required.

[12] The licensee may contact the EEO Branch of the Broadcasts Bureau's Renewal and Transfer Division for information on the employment reports.

Reconsideration, Petition for, Denial of

Petition for reconsideration of *Simon Geller,* 90 FCC 2d 250, denied. Petitioner failed to demonstrate material errors or omissions in Commission's Decision of June 15, 1982.
—*Simon Geller*
Docket No. 21104

FCC 82–461

**BEFORE THE**

# FEDERAL COMMUNICATIONS COMMISSION

**WASHINGTON, D.C. 20554**

| | |
|---|---|
| In re Applications of | |
| SIMON GELLER<br>Gloucester, Massachusetts | DOCKET NO.<br>21104<br>File No. BRH–1610 |
| For Renewal of License of WVCA-FM | |
| GRANDBANKE CORPORATION<br>Gloucester, Massachusetts | DOCKET NO.<br>21105<br>File No. BPH–9391 |
| For Construction Permit | |

MEMORANDUM OPINION AND ORDER

Adopted: October 21, 1982; Released: October 28, 1982

BY THE COMMISSION: COMMISSIONER QUELLO DISSENTING AND ISSUING A STATEMENT; COMMISSIONER RIVERA ABSENT.

1. In a Decision, FCC 82–243, released June 15, 1982, the Commission denied the renewal application of Simon Geller for Station WVCA-FM, Gloucester, Massachusetts and granted the application of Grandbanke Corporation (Grandbanke) for a construction permit for a new FM station to operate on the same frequency.[1] Now before the Commission are: (a)

[1] *Simon Geller,* 90 FCC 2d 250 (1982).

three Petitions for Reconsideration, one of which was filed on July 15, 1982 by the Committee for Community Access, a second filed on July 15, 1982 by Save Our Station and a third filed on July 16, 1982 by Simon Geller; (b) an Opposition to all three Petitions, filed July 28, 1982, by Grandbanke Corporation; (c) an Opposition to the Petitions of Save Our Station and the Committee for Community Access, filed July 28, 1982, by the Broadcast Bureau; (d) an Opposition to Simon Geller's Petition, filed July 29, 1982, by the Broadcast Bureau; (e) a Reply, filed August 9, 1982, by Save Our Station; (f) a Reply, filed August 9, 1982, by Committee for Community Access; and (g) two Replies, filed August 9, 1982, by Simon Geller.

2. Committee for Community Access (CCA) is an organization of listeners and media professionals in the greater Boston area and the surrounding area. Organized in 1971, CCA consists of an advisory board comprised of community leaders, political leaders and broadcast executives; an executive committee with decision making responsibilities; and a general membership of working professionals and members of the general public. CCA requests that, in the event that reconsideration is denied, it be permitted to intervene in this proceeding. Save Our Station (SOS) was formed in response to the Commission's Decision in this proceeding. It claims to represent more than 5000 listeners of Station WVCA-FM, and has promised contributions, in terms of money and time, to enable Geller to substantially increase his non-entertainment programming. Both groups allege that the station's classical music programming provides a unique service to the public, the deprivation of which will adversely affect its members. Accordingly, CCA and SOS claim that they are aggrieved by the Commission's decision to deny Simon Geller's renewal application within the meaning of Section 1.106(b) of the Commission's Rules. Since this action was wholly unanticipated, CCA maintains that there was good reason why it was not possible for CCA to participate in earlier stages of this proceeding. It notes, moreover, that many listeners did participate informally by writing numerous letters to the Commission, Chairman Fowler, President Reagan and members of Congress.

3. We will dismiss both Petitions for Reconsideration and deny CCA's request for intervention. Standing to file a petition for reconsideration is conferred by Section 405 of the Communications Act and Section 1.106 of our Rules. Under those standards a petition for reconsideration may be filed by (1) a party in interest or (2) any person aggrieved or whose interests were adversely affected by the Commission's action and who can show good reason why it was not possible to participate in earlier stages of the proceeding. The latter good cause requirement has been repeatedly upheld by the courts as a valid means of promoting orderliness, expedition and finality in the hearing process.[2]

---

[2] *See Springfield Television Broadcasting Corp.* v. *FCC*,328 F.2d 186 (D.C. Cir. 1964); and *Valley Telecasting Co., Inc.* v. *FCC*, 336 F.2d 914 (D.C. Cir. 1964).

4. Since neither CCA nor SOS participated in earlier stages of this proceeding, they have not established previously that they qualify as parties in interest. Although members of both groups testified in this proceeding, they never sought to participate as parties, and petitioners cannot rely on the informal participation by some of their members in this proceeding to confer standing.[3] Moreover, in our view, neither CCA nor SOS have demonstrated good cause for its failure to participate earlier in this proceeding. SOS was not organized until after the Commission issued its instructions to the staff. Since there has been no showing that SOS could not have organized earlier, however, this cannot excuse the delay.[4] CCA, on the other hand, explains that it followed the course of this proceeding but that it saw no reason to come forward earlier because it was confident the Commission would affirm the Initial Decision's grant of Geller's renewal application. Without determining whether either SOS or CCA would have had standing to participate earlier in this proceeding, it is well established that they may not delay exercising that right until after the Commission has acted and then expect to file a post-grant pleading.[5] Accordingly, we find that neither SOS nor CCA has met the standard for conferring standing required of a petitioner who comes forward for the first time with a post-grant pleading and, therefore, both Petitions for Reconsideration will be dismissed. Moreover, having failed to explain why it did not participate earlier, CCA is not entitled to intervene in this proceeding: it has not explained, pursuant to Section 1.223(c) of the Rules, why it was not possible for it to seek intervention within the prescribed time limit.[6]

5. We will deny Geller's Petition for Reconsideration. Petitioner urges that reconsideration is warranted in light of changed facts and circumstances. Specifically, the Petition relies on the fact that, as a result of transmitter and antenna moves which were completed in May 1980, the station's coverage area has increased;[7] that, effective January 1981, Geller

---

[3] *Cf. Montgomery County Broadcasting Corp.*, 65 FCC 2d 876 (1977); *Redwood Microwave Association, Inc.*, 61 FCC 2d 442 (1976); and *Max M. Leon, Inc.*, 58 FCC 2d 114 (1976), where we held that the filing of an informal objection does not confer standing.

[4] *Cf. Trustees of the University of Pennsylvania*, 42 RR 2d 871, 874 (1978), where we denied a petition to intervene filed by a community organization which was formed ten months after the release of an unfavorable Initial Decision.

[5] *See Springfield Television Broadcasting Corp.* v. *FCC*, 328 F.2d 186 (D.C. Cir. 1964); and *Valley Telecasting Co.* v. *FCC*, 336 F.2d 914 (D.C. Cir. 1964).

[6] Section 1.223 of the Rules requires that petitions for intervention be filed within 30 days after publication in the Federal Register of the hearing issues or substantial amendment thereof. Although the courts have held that representatives of the listening public have standing to intervene in license renewal proceedings, their rights are subject to resonable regulations which the Commission may prescribe. *United Church of Christ* v. *FCC*, 359 F.2d 994, 1005 (D.C. Cir. 1966). The good cause requirement for late filed petitions to intervene has been held to be reasonable. *See Spanish International Broadcasting Co.* v. *FCC*, 385 F.2d 615, 627 (D.C. Cir. 1967); and *Telephone Users Assn.* v. *FCC*, 9 RR 2d 2030 (D.C. Cir. 1967).

[7] We approved Geller's move of his transmitter and antenna sites in 1979 on the condition that "this grant shall not prejudice any action the Commission may take as a result of the proceedings in the Docket 21104."

has increased the station's hours of operation from 44 per week orginally proposed in the application to 93.5; that Geller will be able, as a result of the offer of time and money from SOS[8], to devote an additional five hours each week or 5.35% of his broadcast time to non-entertainment programming.[9] Simon Geller requests that this application be amended to reflect these changes. It is well established, however, that post-designation amendments which enhance an applicant's comparative position will not be allowed.[10] Since Geller was found fully qualified, the reported changes in the operation of Station WVCA-FM only affect the comparative aspects of this proceeding. Accordingly, we will not permit the amendment[11] and, absent such an amendment, we cannot consider this extra-record information on reconsideration.

6. Aside from new matters, all of the arguments advanced in the Petition for Reconsideration were fully considered by the Commission.[12] Nevertheless, we have carefully reviewed Petitioner's contentions. Since the Petition for Reconsideration fails to demonstrate material errors or omissions in our June 15, 1982 Decision, we can find no reason to depart from our action in this case. As we stated in *WWIZ, Inc.*,[13] reconsideration will not be granted for the purpose of again debating matters on which we have already deliberated and spoken.

7. ACCORDINGLY, IT IS ORDERED, That the Petitions for Reconsideration, filed July 15, 1982, by Save Our Station and Committee for Community Access ARE DISMISSED and that the alternate request of Committee for Community Access to intervene in this proceeding IS DENIED.

8. IT IS FURTHER ORDERED, That the Petition for Reconsideration, filed July 16, 1982, by Simon Geller IS DENIED.

---

[8] SOS will make an annual contribution to Geller of $2500 over the next five years and will enlist volunteers to assist Geller in augmenting his non-entertainment programming.

[9] Seven half-hour taped public affairs segments, as well as a thirty minute morning interview talk show, which will be broadcast three times a week, are planned.

[10] *See Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 310 (Rev. Bd. 1970).

[11] We rejected Geller's previous attempt to upgrade his application in terms of the proposed hours of operation because this would improperly enhance Geller comparative position. *See Simon Geller*, 90 FCC 250, 276, n. 126.

[12] All of Geller's arguments relate to the Commission's resolution of the standard comparative issue. According to Geller, the Decision is contrary to our *Report and Order on Deregulation of Radio*, 84 FCC 2d 968 (1981), and arbitrarily ignored the station's entertainment format as well as the public support for the station. Geller claims that, based on this programming which the Commission previously found to be in the public interest when it granted renewals for WVCA and the factors enunciated in *Citizens Communications Center* v. *FCC*, 447 F.2d 1201, *clarified*, 462 F.2d 822, 823 (D.C. Cir. 1972), his past broadcast record was superior and a renewal expectancy is warranted. In addition to a preference for proposed programming, Geller claims that he deserves substantial preferences for diversification and integration since, contrary to the Commission's analysis, diversification and integration are structural factors under the 1965 *Policy Statement*.

[13] 37 FCC 685 (1964), *aff'd sub nom. Lorain Journal Co.* v. *FCC*, 351 F.2d 824 (D.c. Cir.) *cert. denied* 383 U.S. 967 (1965).

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico *Secretary*
October 21, 1982

DISSENTING STATEMENT OF
FCC COMMISSIONER JAMES H. QUELLO

IN RE: PETITIONS FOR RECONSIDERATION IN THE GLOUCESTER, MASSACHUSETTS COMPARATIVE FM RENEWAL PROCEEDING.

I would grant reconsideration so that the Commission could reexamine its comparison of the two applicants. The grounds on which I believe Mr. Geller's application should be preferred over that of the Grandbanke Corporation are fully described in the joint statement of Commissioner Washburn and myself which accompanied the original decision. *See Simon Geller*, 90 FCC 2d 250 (1982) (dissenting opinion).

CATV Cross Ownership Divestitures, Tax Certificates

Request for tax certificate granted. Tax certificate issued to broadcaster for sale of interest in colocated cable television systems. —*Southern Oregon B/cing Co.*

FCC 82–470

**BEFORE THE**

# FEDERAL COMMUNICATIONS COMMISSION

**WASHINGTON, D.C. 20554**

| | |
|---|---|
| In re: | |
| SOUTHERN OREGON BROADCASTING COMPANY d/b/a SOUTHERN OREGON CABLE TV | CSR–2198 |
| Petition for Tax Certificate | |

MEMORANDUM OPINION AND ORDER

Adopted: October 28, 1982; Released; November 3, 1982

BY THE COMMISSION: COMMISSIONER RIVERA ABSENT.

1. On May 14, 1982, California Oregon Broadcasting, Inc. (hereinafter "COBI"), on behalf of its formerly wholly-owned subsidiary, Southern Oregon Broadcasting Company d/b/a Southern Oregon Cable TV (hereinafter "SOC"), pursuant to Section 1071 of the 1954 Internal Revenue Code,[1] filed a "Request for Issuance of Tax Certificate" with respect to the April 30, 1982, sale of SOC's assets and business to McCaw Communications Companies, Inc. (hereinafter "McCaw"). COBI's petition is unopposed.

2. Prior to its sale, SOC operated cable television systems serving Medford, Klamath Falls, Grants Pass, and Roseburg, Oregon, and neigh-

[1] Section 1071 of the 1954 Internal Revenue Code provides:

> If the sale or exchange of property (including stock in a corporation) is certified by the Federal Communications Commission to be necessary or appropriate to effectuate a change in policy of, or the adoption of a new policy by, the Commission with respect to the ownership or control of radio broadcast stations, such sale or exchange shall, if the taxpayer so elects, be treated as an involuntary conversion of such property within the meaning of Section 1033. . . .

boring communities. COBI is the sole stockholder of Oregon Broadcasting Co. (hereinafter "OBC"), licensee of Television Broadcast Stations KOBI (ABC/CBS, Channel 5), Medford, Oregon, and KOTI (ABC/CBS, Channel 2), Klamath Falls, Oregon. In addition, OBC owns 50% of South West Oregon Television Broadcasting Corp., licensee of Television Broadcast Station KPIC (NBC, Channel 4), Roseburg, Oregon. Each of SOC's systems is within the predicted Grade B contour of KOBI. In addition, SOC's Klamath Falls and Roseburg systems are within the predicted Grade B contours of, respectively, KOTI and KPIC. These cross-interests have existed since prior to the July 1, 1970, "grandfathering" date of Section 76.501(b)(2) of the Commission's Rules. Therefore, COBI was not required to divest itself of its cable television or television broadcast interests. Nevertheless, earlier this year, COBI sold SOC to McCaw.

3. In support of its petition, COBI argues that it is established Commission policy that the voluntary divestiture of a "grandfathered" cross-interest is clearly appropriate to effectuate a new or changed Commission policy, citing *Issuance of Tax Certificates*, FCC 76–337, 59 FCC 2d 91 (1976), and *Rahall Communications Corporation*, FCC 77–826, 67 FCC 2d 295, 298 (1977). Therefore, contends COBI, because the sale of SOC ". . . resulted in the complete divestiture of COBI's ownership in cable television facilities, and promoted the Commission's television/cable cross-ownership policy," COBI is entitled to the requested tax certificate.

4. In order to obtain a tax certificate, pursuant to Section 1071 of the Internal Revenue Code, for the voluntary divestiture of a "grandfathered" cross-interest, such divestiture must serve the public interest as being an ". . . appropriate means of effectuating the Commission's Rules and policies prohibiting the cross-ownership, operation, control, or interest of a cable television system with a television broadcast station whose predicted Grade B contour overlaps in whole or in part the service area of such system." *Rahall Communications Corporation, supra. Accord, Issuance of Tax Certificates, supra.* The sale by COBI of SOC's assets and business clearly fulfills the above criteria, as it eliminates "grandfathered" cross-interests between SOC and KOBI, KOTI, and KPIC, in furtherance of the Commission's cross-ownership policies. COBI is therefore entitled to the requested tax certificate.

Accordingly, IT IS ORDERED, That the "Request for Issuance of Tax Certificate" (CSR–2198) filed May 14, 1982, by California Oregon Broadcasting, Inc. IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico *Secretary*

Comparative Criteria
Local Ownership
Minority Ownership, Effect on Application

Review Board Decision, 88 FCC 2d 1204, set aside. Credit for minority ownership in a comparative proceeding found to be of at least equal significance as credit for local ownership. Applicant also awarded moderate enhancement credit for residence and past participation in civic activities within the service area of the proposed station but outside of the community of license.
—*Waters B/Cing Corp.*
BC Docket No. 80–688

FCC 82–483

**BEFORE THE**

# FEDERAL COMMUNICATIONS COMMISSION

**WASHINGTON, D.C. 20554**

| | |
|---|---|
| In re Applications of | |
| WATERS BROADCASTING CORPORATION<br>Hart, Michigan | BC Docket No.<br>80–688<br>File No.<br>BPH–791226CD |
| WEST MICHIGAN BROADCASTING COMPANY<br>Hart, Michigan | BC Docket No.<br>80–689<br>File No.<br>BPH–800318AI |
| For a Construction Permit for a New FM Station | |

*Appearances*

*Vincent J. Curtis, Jr., Roderick Porter* and *Patricia A. Mahoney* on behalf of Waters Broadcasting Corporation; *Eric L. Bernthal* and *Daniel F. Van Horn* on behalf of West Michigan Broadcasting Company; *Pluria W. Marshall*, on behalf of National Black Media Coalition, *amicus curiae; Julian Freret* on behalf of Alpine Broadcasting Company; *Peter Gutman* on behalf of HJR Communications, Inc.;[1] and *Norman Goldstein* and

[1] The applications of Alpine Broadcasting Company and HJR Communications, Inc., were dismissed by the ALJ. 88 FCC 2d 1213, 1222 (1981).

*Edythe Wise* on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

Adopted: October 28, 1982; Released: December 1, 1982

COMMISSIONER FOGARTY FOR THE COMMISSION: COMMISSIONERS FOWLER, CHAIRMAN AND SHARP DISSENTING AND ISSUING STATEMENTS; COMMISSIONERS FOGARTY AND RIVERA ISSUING SEPARATE STATEMENTS.

*Background*

1. This proceeding involves mutually exclusive applications for a new FM station in Hart, Michigan, filed by Waters Broadcasting Corporation (Waters) and West Michigan Broadcasting Company (West Michigan). Waters is wholly owned by Mrs. Nancy Waters, a black woman. Mrs. Waters resides 30 miles from Hart, in Muskegon, Michigan, which is within the service area of the proposed station. Mrs. Waters will move to Hart if her application is granted. West Michigan is owned by three local residents, one of whom, with a 24% interest, is a woman. Both applicants propose 100% integration of ownership and management.

2. In a Decision (88 FCC 2d 1204, released December 29, 1981), the Review Board granted West Michigan's application. The Board found that West Michigan's integration proposal was substantially enhanced by the local residence of its shareholders and their past participation in civic activities in Hart, Michigan. The Board also gave West Michigan some credit for its 24% female ownership. The Board found that Waters' integration proposal was substantially enhanced by its 100% minority and female ownership. However, it awarded Waters slight enhancement only for Mrs. Waters' local residence and past participation in civic activities, finding that they were unconnected to the proposed community of license. The Board concluded that this was a close case involving a choice between the Commission's meritorious policies favoring local ownership and increasing minority ownership of broadcasting stations. Citing the historic and continuing importance attributed to local ownership, the Board concluded that the public interest, convenience and necessity would be better served by a grant of West Michigan's application.

3. The Commission now has before it for consideration: the Board's Decision, an Application for Review, filed January 28, 1982, by Waters, a Protective Application for Review, filed January 28, 1982, by West Michi-

gan,[2] an Opposition filed February 11, 1982, by West Michigan and an Opposition filed February 12, 1982, by Waters; a Motion for Leave to Intervene, filed January 28, 1982, by the National Black Media Coalition (NBMC), an Opposition filed February 9, 1982, by West Michigan, a Motion to Amend Motion for Leave to Intervene, filed June 9, 1982, by NBMC, and an Opposition filed June 17, 1982, by West Michigan; Comments filed February 12, 1982, by NBMC,[3] a Motion to Strike, filed February 19, 1982, by West Michigan, an Opposition filed March 9, 1982, by NBMC, and a Reply filed March 17, 1982, by West Michigan; a Request for Expedited Action filed February 10, 1982, by Waters, and Comments filed February 12, 1982, by West Michigan.[4]

4. We substantially agree with the findings and conclusions of the Board, and they are affirmed except as they are modified by this Decision. We find, however, that the Board erred in its consideration of the comparative factors by failing to give sufficient credit to Waters for Mrs. Waters' local residence and past participation in civic activities, and by holding that West Michigan's enhancement for its principals' local residence and civic activities was to be preferred over Waters' enhancement for local residence and civic activities and for its minority and female ownership. In our view, the factors favoring a grant of Waters' application compel a finding that Waters is entitled to a determinative comparative advantage. Thus, we will reverse the Review Board and grant Waters' application.

*Local Residence*

3. Mrs. Water resides in Muskegon, which is located 30 miles from Hart and within the service area of the proposed station. The Review Board accorded "only slight enhancement" for Mrs. Waters' residence and civic activities finding that they are remote from and unrelated to Hart.[5] Waters argues that the *1965 Policy Statement*[6] prescribed that the credit for residence within a proposed service area "closely follows" credit for residence in the principal community, and that the Board erred in its determination that Waters is entitled to "only slight enhancement" for her

[2] Pursuant to the *Note* to Section 1.115(b)(5) of the Commission's Rules, the parties requested leave to file further briefs and oral argument. Because the issues in this case have been fully discussed in the Applications for Review and we do not believe further briefing and oral argument would be helpful, the requests for briefing and oral argument will be denied.

[3] NBMC has not established a basis for intervention pursuant to Section 1.223 of the Commission's Rules. Nevertheless, because of the significance of the issues raised in this proceeding, we will allow NBMC to participate as an *amicus curiae* and accept its pleading. *Cowles Broadcasting, Inc.*, 86 FCC 2d 993, 1018–19 (1981); *The Trustees of the University of Pennsylvania*, FCC 78–188, 42 RR 2d 871 (1978).

[4] Consistent with the priority of other matters and the efficient disposition of the Commission's business, we have given expeditious consideration to the pleadings filed in this proceeding.

[5] 88 FCC 2d at 1210.

[6] *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965).

residence and civic activities. West Michigan argues that Waters is entitled to no credit for Mrs. Waters' residence and civic activities because she is undertaking to serve Hart and Oceana County only.[7]

6. *Discussion.* The *1965 Policy Statement* recognized that participation in station affairs by local residents is desirable because it indicates "a likelihood of continuing knowledge of changing local interests and needs." Past participation in civic affairs similarly indicates a "knowledge of and interest in the welfare of the Community." The Commission concluded that similar benefits, albeit on a lesser scale, would be derived from residence in the service area. In addressing the merit to be awarded for ownership participation in station operations, the Commission found that although "residence in the principal community to be served will be of primary importance, [it will be] closely followed by residence outside the community, but within the proposed service area."[8] Here, the Board properly awarded West Michigan substantial enhancement credit for the local residence and past participation in civic activities of its principals. Under the *1965 Policy Statement*, however, we find that enhancement credit for Mrs. Waters' residence and past participation in civic activities should "closely follow" and the slight credit awarded by the Review Board is inadequate. Given Mrs. Waters' record of community activities[9] and her residence located 30 miles from the community of license, but within the service area of the proposed station, Waters' integration proposal is entitled to a moderate enhancement credit.[10]

*Minority Ownership*

7. The Review Board found that Waters is entitled to a substantial enhancement credit for minority ownership.[11] The Board, however, in

---

[7] Citing the *Primer on Ascertainment by Broadcast Applicants*, 27 FCC 2d 650, 658 (1971), West Michigan argues that the Board erred in giving Waters even slight credit because it would not serve Muskegon "in the sense of responding to specific community problems." Waters' ascertainment was confined to Hart and the surrounding area of Oceana County. Hart is located in Oceana County. Muskegon is in an adjacent county. West Michigan's argument is without merit. The *Primer* affords applicants wide discretion in determining which areas outside the principal community should be ascertained. The failure to ascertain the needs of the community of residence of an applicant does not detract from the presumption of knowledge of the service area which the *1965 Policy Statement* attributes to the applicant. 1 FCC 2d at 395–96.

[8] 1 FCC 2d at 396.

[9] Waters Exh. 1.

[10] Although some previous Commission cases have indicated that civic activities outside of the principal community are "not meaningful in relationship to service to the proposed community (*"What the Bible Says, Inc."*, 28 FCC 2d 551, 556 (Rev. Bd. 1971); *Community Broadcasting Co., Inc.*, 60 FCC 2d 951, 953 (Rev. Bd. 1976)), civic activities indicate a knowledge of and interest in the welfare of the community, and we thus agree with the Board "that it would be more consistent with the *Policy Statement* to treat civic participation in the same manner as local residence. . . ." 88 FCC 2d at 1210. Where we differ with the Board, is in our conclusion that Waters in entitled to moderate enhancement credit for Mrs. Waters' local residence and participation in civic activities.

[11] 88 FCC 2d at 1210–11.

weighing the comparative factors, favored West Michgan because of its local ownership.[12] West Michigan, noting the absence of a significant black population in Hart and Oceana County, argues that the Board awarded too much credit to Waters for minority ownership. Conversely, Waters and NBMC argue that the Board's Decision, by relying on local ownership as the determinative factor, is in conflict with the Commission's policy favoring increased minority ownership of broadcast facilities.

8. *Discussion.* The Review Board's Decision properly observed that minority ownership is entitled to substantial credit in enhancing an applicant's integration proposal. As this Commission, the courts, and the Congress have recognized, there is a critical underrepresentation of minorities in broadcast ownership, and full minority participation in the ownership and management of broadcast facilities is essential to realize the fundamental goals of programming diversity and diversification of ownership which are at the heart of the Communications Act and the First Amendment.[13] Minority ownership is therefore a valid and, indeed, highly meritorious consideration in determining which applicant, from among competing applicants, will provide the best practicable service to the public. We assign "high importance to fostering the participation of heavily underrepresented minorities in the ownership and operation of broadcast stations,"[14] and we have consistently granted substantial credit for integration of minority ownership in comparative proceedings.[15] Accordingly, Waters is entitled to substantial enhancement credit with respect to its integration proposal.

9. Here, we reject any notion that the credit awarded for minority ownership should be dependent upon a nexus with a minority population in the proposed service area. Such an argument is wholly inconsistent with our past determinations granting full credit minority ownership

---

[12] 88 FCC 2d at 1212.

[13] *TV 9, Inc.* v. *FCC*, 945 F.2d 929, 937–38 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974); *Citizens Communications Center* v. *FCC*, 447 F.2d 1201, 1213 n.36 (D.C. Cir. 1971); *Minority Ownership of Broadcast Facilities*, 68 FCC 2d 979, 981–82 (1978).

Congress has recently affirmed the importance of minority ownership in mass media telecommunications policy in its passage of the Communications Amendments Act of 1982, P.L. 97–259, (enacted September 13, 1982), which amended, *inter alia*, Section 309(i) of the Communications Act of 1934, as amended, with respect to the Commission's authority to grant licenses or permits for spectrum uses through a system of random selection. In discussing the preferences for diversification and minority ownership to be included in the random selection system, the Conference Report of this legislation states:

> "The Conferees find that the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications, as it has adversely affected their participation in other sectors of the economy as well. . . .

[14] *Clear Channel AM Broadcasting*, 78 FCC 2d 1345, 1368 (1980), *aff'd sub nom. Loyola University* v. *FCC*, 670 F.2d 1222 (D.C. Cir. 1981).

[15] *Alexander S. Klein, Jr.*, 86 FCC 2d 423 (1981); *Radio Gaithersburg*, 72 FCC 2d 820 (Rev. Bd. 1979), *rev. denied*, FCC 80–734, released December 4, 1980.

without regard to the nature of any minority population,[16] and holding that the public interest benefits and advantages of minority ownership are not dependent on proof that the minority owned station will specifically program to meet minority needs.[17] In view of the continuing underrepresentation of minorities in broadcast ownership, and because minority controlled stations are likely to serve the important function of providing a different insight to the general public about minority problems and minority views on matters of concern to the entire community and the nation, it would be contrary to Commission policy to restrict credit according to the racial and ethnic composition of the proposed community of license or service area.[18] Moreover, a nexus requirement would unduly restrict future expansion of minority broadcast ownership contrary to established Commission policy.

*Diversification*

10. James Waters, husband of Mrs. Waters, is a member of the Board of Regents of the University of Michigan. The Board of Regents is the licensee of three non-commercial FM radio stations and one non-commercial television station. The Review Board found that Mr. Waters' position as a Regent is not of decisional significance and not a basis for awarding West Michigan a preference for diversification. In its Protective Application for Review, West Michigan argues that it is entitled to a preference for diversification, because as a Regent, Mr. Waters is responsible for the University's broadcast interests, and his media interests are attributable to Mrs. Waters. For reasons set forth in the Initial Decision[19] and in the Review Board's Decision[20] we find that Mr. Waters' non-ownership interest in the University of Michigan stations is too remote to be accorded significance as a comparative factor in this case.

*Conclusions*

11. The Review Board correctly recognized that Waters was entitled to substantial enhancement credit for minority ownership and properly awarded substantial enhancement credit to West Michigan for local ownership. We disagree, however, with its conclusion that West Michigan

---

[16] *Radio Gaithersburg, supra. Cf. Minority Ownership of Broadcast Facilities, supra*, at 982–83 (FCC tax certificate and distress sale policies).

[17] *Lee Broadcasting Corporation*, 90 FCC 2d 230 (1982). As stated by the court in *TV 9, Inc.* v. *FCC*, *supra*: "[I]t is upon ownership that public policy places primary reliance with respect to diversification of content, and that historically has proven to be significantly influential with respect to editorial comment and the presentation of news. . . . Reasonable expectation, not advance demonstration, is a basis for merit to be accorded relevant factors." 495 F.2d at 938.

[18] *See Clear Channel Broadcasting, supra*, at 221, citing *Minority Ownership of Broadcast Facilities, supra* at 981.

[19] 88 FCC 2d 1213, 1218–19 (1981).

[20] 88 FCC 2d at 1206–07.

should be ultimately preferred because of the enhancement for its local ownership. The comparative hearing process requires a weighing of all comparative factors in light of the Commission's policies and the application of those policies to the facts and circumstances of the case. The Board expressed the view that there is a "historical preference for local ownership," observing that the *1965 Policy Statement* states that "local residence complements the statutory scheme and Commission allocation policy of licensing a large number of stations throughout the country, in order to provide for attention to local interests, and local ownership also generally accords with the goal of diversifying control of broadcast stations."[21] The Board also noted that the concept of localism was recently affirmed as an important element of service to the public in *Deregulation of Radio*.[22] However, the Review Board gave insufficient weight to the Commission's minority ownership policy. While the policy favoring local ownership may be first in time, it is not thereby first in importance. As we have emphasized,[23] the fostering of minority ownership is also in and of itself a fundamental policy goal of this Commission. The Commission's licensing policy favoring diversification of control of broadcast ownership is also served by our minority ownership policy, and we have identified minority ownership as a "touchstone" for the application of a number of other Commission policies.[24] Accordingly, minority ownership policy is to be given full application and significant weight in comparative broadcast proceedings.

12. In this case, we need not qualitatively differentiate between the substantial enhancement credits awarded for local ownership and for minority ownership or choose between these important policies because of the increased credit which is warranted for Mrs. Waters' local residence and activities. We agree with the Board that the only basis for decision is the qualitative enhancement of the applicants' 100% full-time integration proposals. West Michigan is entitled to substantial enhancement for local residence and past participation in civic activities in the proposed community of license, but its substantial enhancement is closely followed by Waters' moderate enhancement for Mrs. Waters' residence and past participation in civic activities in the proposed service area. Waters is also entitled to a substantial enhancement for its 100% minority and female ownership integrated with full-time management, while West Michigan's enhancement for 24% female ownership integrated with full-time management is substantially less. Weighing all of the relevant comparative factors, we find that Waters' substantial enhancement for minority and

---

[21] 1 FCC 2d at 396.

[22] 84 FCC 2d 968, 994, 997 (1981).

[23] Paragraphs 8 and 9 *supra*.

[24] *Minority Ownership of Broadcast Facilities, supra; Clear Channel AM Broadcasting, supra.*

female ownership, together with the moderate enhancement credit awarded for Mrs. Waters' residence and civic activities, mandate the conclusion that the grant of Waters' application will better serve the public interest, convenience, and necessity.

13. ACCORDINGLY, IT IS ORDERED, That the Motion to Intervene, filed January 28, 1982, and the Motion to Amend Motion for Leave to Intervene, filed June 9, 1982, by National Black Media Coalition ARE DENIED, but that National Black Media Coalition IS GRANTED leave to participate in this proceeding as an *amicus curiae.*

14. IT IS FURTHER ORDERED, That the Motion to Strike, filed February 19, 1982, by West Michigan Broadcasting Company, IS DENIED, and that the Comments, filed February 12, 1982, by National Black Media Coalition, ARE ACCEPTED as an *amicus* brief.

15. IT IS FURTHER ORDERED, That, the Request for Expedited Action, filed February 10, 1982, by Waters Broadcasting Corporation, IS GRANTED to the extent indicated herein and in all other respects IS DENIED.

16. IT IS FURTHER ORDERED, That pursuant to Section 1.115(g) of the Commission's Rules, the Application for Review, filed January 28, 1982, by Waters Broadcasting Corporation IS GRANTED, and the Protective Application for Review, filed January 28, 1982, by West Michigan Broadcasting Company, IS DENIED.

17. IT IS FURTHER ORDERED, That the Decision of the Review Board, 88 FCC 2d 1204, released December 29, 1981, IS SET ASIDE, that the application of Waters Broadcasting Corporation (File No. BPH–791126CD) for a contruction permit to establish a new FM station at Hart, Michigan, IS GRANTED, and that the application of West Michigan Broadcasting Company (File No. BPH–800318AI), IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico *Secretary*

DISSENTING STATEMENT
OF
CHAIRMAN MARK S. FOWLER
FEDERAL COMMUNICATIONS COMMISSION

RE: HART, MICHIGAN COMPARATIVE FM PROCEEDING

In another context, one of my colleagues in the majority observed, "Whatever the deficiencies of the comparative process, that process binds us with the force of law, and we should strive to apply it within the bounds of our capability."[1] The cogency of that statement is underlined by the

[1] Dissenting statement of Chairman Charles D. Ferris and Commissioners Joseph R. Fogarty and Tyrone Brown, *WPIX, Inc.*, 68 FCC 2d 381, 415 (1978).

majority's opinion in this case, which I believe to be at odds with judicial and Commission precedent, and, as such, to constitute an unexplained and unwise change of policy that may, additionally, be of dubious constitutionality.

For all the debate this decision has provoked, this case is deceptively simple to analyze and resolve. Actually, one need only grasp several salient (and undisputed) facts as a baseline for the analysis:

1. Mrs. Nancy Waters lives in Muskegon, Michigan.
2. Muskegon is in Lake County.
3. The proposed FM station is in Hart, Michigan.
4. Hart is in Oceana County.
5 Mrs. Waters is Black.
6. There are "very few, if any" Blacks in either Hart or Oceana County.
7. The proposed FM station will be the first station to serve Hart and Oceana County.

The difficult aspect of this case, as in most, lies in applying the law to the facts to reach the correct result. It is at this stage that the majority's analysis begins to go rather obviously awry.

*Local Residence*

The majority first draws bead on the slight enhancement the Review Board awarded Waters due to Mrs. Waters' residence and civic participation in Muskegon.[2] In increasing Waters' enhancement to moderate, the majority cites the *Policy Statement on Comparative Broadcast Hearings* for the proposition that "residence in the principal community to be served will be of primary importance, closely followed by residence outside the community, but within the proposed service area."[3] Because Muskegon lies within the 1 Mv/m contour of the proposed station, the majority reasons that Mrs. Waters' enhancement for local residence and civic participation should be increased to "moderate" so as to "closely follow" West Michigan's "substantial" enhancement credit for its principals' longstanding residence and civic participation in Hart.

The first observation to be made in this regard is that the *Policy Statement* is a framework, and not a straitjacket, for decisionmaking.[4] The cited sentence from the *Policy Statement* has always been interpreted as it was intended by the Commission—as a general policy

[2] Neither Waters nor West Michigan have any other relevant media holdings and both propose full-time integration of ownership and management. Thus, their proposals are quantitatively equal on these scores, and the case turns on the degree of qualitative enhancement each is entitled to on the integration criterion.

[3] 1 FCC 2d 393, 396 (1965).

[4] See *e.g.*, *TV 9, Inc. v. FCC*, 495 F. 2d 929, 942 (D.C. Cir. 1973) (supplemental opinion on rehearing).

guideline, not as a directive to govern any and all future cases notwithstanding their varying factual patterns. What citation to the above sentence from the *Policy Statement* fails to show is that the reason the Commission awards enhancement credit for local residence and civic participation at all is that, "Past participation in civic affairs will be considered as a part of a participating owner's local residence background, as well as any other local activities indicating a knowledge of and interest in the welfare of the community."[5] The salient fact here—totally ignored by the majority—is that the record fails to show either that Muskegon and Hart have anything in common or that Mrs. Waters' civic activities in Muskegon are such that they evince "a knowledge of and interest in" Hart.[6] When one stops to remember that the community of license of the proposed station is Hart and not Muskegon, and that the station in question is the first *and only* station proposed to serve Hart, this error becomes even more obvious. It becomes a major error because Waters' application, as well as subsequent statements during the hearing, show that Waters proposes to program to serve the needs and interests of *only* Hart and the surrounding area of Oceana County, *not* Muskegon and Lake County communities. (Tr. 60–61.)

To give the majority its due, the opinion does note in the margin that "some previous Commission cases have indicated that civic activities outside of the principal community are not meaningful in relationship to the community of service," and cites a couple of the numerous cases standing for that proposition. However, after making that admission, the majority proceeds serenely to observe that "civic activities indicate a knowledge of and interest in the welfare of the community . . ." Quite so. But again, the majority misses the elementary fact that Hart is not Muskegon and that Waters proposed to serve Hart not Muskegon.

Quite simply, this is not a case in which the record shows that Hart has anything whatever in common with Muskegon other than the fact, duly noted by the majority, that each lies 30 miles distant from the other. Under these circumstances, to award Waters enhancement credit for her residence and civic activities in Muskegon only marginally less than that awarded West Michigan's principals, who are long-time residents of Hart and who have been active in civic affairs in Hart for many years, is unjustified. This is not a case in which the competing applicants live in areas that are just as equally oriented toward Hart as toward Muskegon, nor is this a case in which any particular activity of record in Waters' past evinces any special familiarity with Hart, nor is this a case in which both competing applicants will be relatively unintegrated into station manage-

[5] 1 FCC 2d at 396.

[6] In this regard, the Initial Decision observes simply that Ms. Waters "has been active in civic affairs and political activities in the service area."

ment—all cases wherein a literal interpretation of the cited sentence from the *Policy Statement* would make sense. In this case, in which we are evaluating competing applicants for the first radio station to serve Hart and who both propose full integration of station ownership and management, we are holding that a person with no connection of record with Hart, either residential or civic, is to be awarded only slightly less enhancement credit than three longtime Hart residents who have a combined extensive record of participation in Hart's civic affairs. Given these facts, a literal application of the cited sentence from the *Policy Statement* makes no sense at all.

*Minority Ownership*

As troublesome as this error is, however, it cannot compare to the majority's approach to the issue of the weight to be given to Waters' enhancement derived from minority ownership. Noting that there is a critical underrepresentation of minorities in broadcast ownership, and that minority ownership is a pertinent consideration in determining which among competing applicants will best serve the public interest, the majority would award substantial—and, in this case, decisional—enhancement credit to Waters on its integration proposal, notwithstanding the absence of any appreciable Black population in Hart or in Oceana County.

This aspect of the majority's decision is by far the most troubling, both precedentially and perhaps constitutionally. The majority goes to considerable lengths to discredit the contention that enhancement credit for the integration of minority owners into management should not be a static absolute but rather should be proportionate to the minority population to be served by the station. Because I believe that such a "nexus" is not only consistent with past precedent but may also be a necessary constitutional safeguard, I would like to elaborate on this issue.

First, it is essential that my precise contention be clearly understood. I am most emphatically *not* saying that in factual circumstances such as these that *no* enhancement credit for integration of minority ownership into management should be given. What I *am* saying is that it is entirely consistent with Court and Commission precedent to *weight* the *degree* of enhancement commensurate with the extent to which minorities are represented in the community of license.

I would next note that there is nothing inherently reprehensible or revolutionary in the proposition that qualitative enhancements generally are susceptible to being increased or diminished depending on the interplay of other facts in the case. The *Policy Statement* specifically provides for such weightings.[7] This is entirely consistent with the purpose for

[7] 1 FCC 2d at 395.

which qualitative enhancements are awarded in the first place: that is, that certain additional factors attaching to the applicant's integration proposal either magnify or detract from the degree to which its integration proposal will, in fact, contribute to the achievement of the *Policy Statement* goal of best practicable service. All qualitative enhancements are traceable to this fundamental concern that the programming provided the local community be the programming that best fills local needs and interests.[8] The enhancement awarded to an applicant's integration porposal by virtue of the participation in management of principals who are members of a minority group is no different in this regard. In point of fact, both Court and Commission precedent specifically reference the fact that such enhancement credit is awarded because of the presence of corresponding minority group members in the local community and thus because the minority ownership/participation in management will to a special degree help assure that special minority programming needs and interests are met. Thus, it is entirely consistent not only with the purpose underlying this particular qualitative enhancement, but also with the purpose underlying such enhancements generally, to find that it can be magnified or diminished depending on other pertinent facts in the case, particularly the presence or absence of a minority presence in the local community.

The principal case in this area is, of course, *TV 9, Inc. v. FCC*, which the majority cites, *inter alia*, in rejecting the notion of a weighted enhancement. A careful reading of *TV 9*, however, gives scant support for citing it for this proposition. In *TV 9*, one of the competing applicants, Comint, had two principals who were Black and whose combined interests totaled 14.7% of Comint. Both were apparently to be integrated into the management of the proposed station. The Court recited the pertinent facts in this way:

> The principals of Comint include two local Black residents . . . *Both have lived in the local area, of which about 25% of the population are Black, for more than 20 years, and have not only been active in advancing the interests of the Black members of the community but also have been primarily responsible for significant achievements in bettering the conditions of the Black population.*[9]

Notwithstanding these facts, the Commission failed to award Comint any enhancement on the general grounds that it could not presume a correlation between the integration proposal at issue and the station's likelihood of programming to meet local needs and interests. In reversing the Commission's decision, the Court stated quite plainly that:

---

[8] See *e.g., Gainesville Media, Inc. et al.*, 70 FCC 2d 71, 135 (I.D., 1977), 70 FCC 2d 58 (Rev. Bd. 1978), wherein the enhancement was "tempered by the fact that" [the principal in issue] is not a local resident and has not been active in local Gainesville affairs notwithstanding a brief period of residence in Gainesville . . ."

[9] 495 F.2d at 935, emphasis added.

> Color blindness in the protection of the rights of individuals under the laws does not foreclose consideration of stock ownership by members of a Black minority where the Commission is comparing the qualifications of applicants for broadcasting rights *in the Orlando community . . . This minority stock ownership of an applicant serving the Orlando community is a consideration relevant to a choice among applicants of broader community representation and practicable service to the public.* The credit awarded due to [one principal's] participation, as a part owner, in management is not the same as credit based on *broader community representation* attributed to [both principals'] stock ownership and participation.[N]
>
> [N] What the Commission seems to have enunciated as preferable under the integration of ownership is management control by principals who will be representative of the local community and responsive to its needs . . . *The fact that members of a local minority group which otherwise is not represented in the ownership of mass communications media in the Orlando area . . . are participating principals is relevant to considerations of ownership representation of the local community and it is consistent with the objective of the best practicable broadcast service to the community.*[10]

In a supplemental opinion issued to clarify the Court's apparent confusion of stock ownership and integration, and the terms "preference" and "merit," the Court stated clearly that:

> *The record demonstrates that [both principals have] been outstanding in seeking to better the conditions of the Black minority representing 25 percent of the Orlando community* . . . In carrying their civic interests now into this new association it is only reasonable to hold that the combined participation of these two men will promote genuine and meaningful diversity of programming and thereby serve the public interest.[11]

Admittedly, the Court did not use the precise *word* "nexus." But there cannot be any serious doubt that in *TV 9* the nexus was not only present but was also a critical factor in the court's rationale.[12] Lest there be any serious doubt on this score, in a subsequent case, *Garrett v. FCC*,[13] the same court was specific:

> The entire thrust of *TV 9* is [that] Black ownership and participation together are themselves likely to bring about programming *that is responsive to the needs of Black*

---

[10] *Id.* at 936–937, emphasis added.

[11] *Id* at 942, emphasis added.

[12] Not surprisingly, the majority fails to account for this rather evident aspect of the Court's opinion. Instead, the majority at n. 17 cites the *TV 9* court's quotation of a footnote in the earlier *Citizens Communications Center v. FCC*, 447 F. 2d 1201, 1213 n. 36 (D.C. Cir. 1971) by which the majority purports to show that the *TV 9* opinion was rendered devoid of any concept of nexus. In context, however, the *Citizens Communications Center* footnote elaborated on the statement that challengers to an incumbent licensee must generally be given at least the chance to a comparative hearing under Section 309(e) of the Act. Thus, the footnote itself is not pertinent to the issue in this case. What *is* pertinent, however, and what the majority again neglects to recite, is the *TV 9* court's elaboration on the import of the *Citizens Communications Center* footnote: "It is consistent with the primary objective of a maximum diversification of ownership of mass communications media for the Commission in a comparative license proceeding to afford favorable consideration to an applicant who, not as a mere token, *but in good faith as broadcasting community representation, gives a local minority group media entrepreneurship.*" *Id.* at 937, emphasis added.

[13] *Garrett v. FCC*, 513 F.2d 1056 (D.C. Cir. 1975).

> *citizenry*, and that that 'responsible expectation' without 'advance demonstration' gives them relevance.[14]

That, in essence, is a perfect distillation of the rationale of *TV 9*. The "nexus" that need *not* be demonstrated is the nexus between integration of minority owners into management on the one hand and the presentation of programming responsive to the concerns of the local minority community on the other. The nexus that does seem to be germane, however, is the nexus between the enhancement and the presence of a local minority population.

Nor was this element of nexus lost upon the Commission in the ensuing major case involving the renewal of WPIX(TV), New York. In fact, the Commission's decision rather explicitly recognized the element of nexus in the decision to consider minority ownership and participation as an enhancement to the integration criterion rather than as an element of the diversification criterion. In dissenting to this treatment of minority ownership, one of my colleagues in today's majority would have made minority ownership and involvement "a legally separate issue which . . . should not be subsumed under either the distinct diversification or integration issues." In this dissenting statement, just as in today's majority opinion, an attempt was made to cite *TV 9* in support of this proposition:

> It is at least clear that the court was telling the Commission that minority ownership and participation in station management is in the public interest, *especially where the licensee or station at issue serves a significant minority audience* . . . The record [in *WPIX*] shows that [one applicant's minority-group stockholders] have significant broadcast experience *and substantial involvement in minority rights issues in the community proposed to be served.*[15]

Thus, in *WPIX* apparently even the dissenters were cognizant of the relevance of a nexus between enhancen ent under the integration criterion for minority ownership and participation and the presence of minorities in the community of license.

Undaunted, the majority here states that the nexus argument is "wholly inconsistent with our past determinations granting full credit for minority ownership without regard to the nature of any minority population," citing *Radio Gaithersburg.*[16] *True enough, no nexus was alluded to in the Radio Gaithersburg*—but in that case the enhancement awarded was not dispositive. On the other hand, however, other cases are careful to show the presence of minorities in the city of license where enhancement credit is awarded. See, *e.g.*, *Gainesville Media, Inc.*, 70 FCC 2d 58 at 99 (Rev. Bd., 1978); *Midwest Broadcasting Company*, 70 FCC 2d 1506, 1508

---

[14] *Id.* at 1063.

[15] *WPIX, Inc.*, supra at n. 1, emphasis added.

[16] *Id.* at 452.

(I.D., 1978) *modified on other grounds*, 70 FCC 2d 1448 (Rev. Bd. 1979), *rev. denied*, FCC 79–397; *Deep South Radio*, 71 FCC 2d 138, 141 (Rev. Bd. 1979), *rev. denied*, 46 RR 2d 1657 (1980); *compare Acadiana Broadcasting Co., Inc.*, 88 FCC 2d 367, 375 (I.D., 1981), 88 FCC 2d 364 (Rev. Bd. 1981); *Biard Communications, Inc.*, 88 FCC 2d 387, 395–396 (I.D., 1981), 88 FCC 2d 381 (Rev. Bd. 1981).

In this case, in stark contrast to *TV 9*, Ms. Waters testified that there are "few, if any" Blacks in the Hart-Oceana County area Waters proposes to serve; that, in fact, the 1970 census showed that only 0.3 percent of the population of Oceana County were Black. In the course of the required ascertainment survey, Ms. Waters interviewed no Black leaders and proposed no programs to meet interests and concerns of Blacks. Waters' reference during the course of the hearing to substantial Black populations in Muskegon and nearby Lake County communities was stricken from the record as irrelevant. (Tr. 56–61.)

Notwithstanding these facts, the majority advances several reasons purportedly justifying its decision to award Waters substantial qualitative enhancement for integration of its minority owner into management notwithstanding the absence of minorities in the local community. The first of these, apparently regarded by the majority as its strong suit, is the admitted underrepresentation of minorities in terms of broadcast station ownership, and the effect this underrepresentation has on true programming diversity. I am emphatically *not* insensitive to the fact that minorities are underrepresented in the ranks of facilities ownership, and I have given my full support to devising ways to swell the ranks of minority owners. Nevertheless, the simple fact of the matter is that, unlike our distress sale policy and unlike rulemakings undertaken with the aim, *inter alia*, of increasing opportunities for minority ownership by increasing the number of available stations, the comparative process is not and never has been meant for the express purpose of increasing minority ownership. The twofold purpose of the comparative process is to choose the applicant who will render the best possible service to the local community and to further diversification of control.[17] These aims are regarded as being complementary in that diversification of ownership is calculated to assure that the unique needs and interests of the local community will be served rather than being subsumed in presumably larger and possibly conflicting interests of a multiple owner.[18]

The critical distinction that must be kept in mind, however, is that diversification is *not* the same as minority ownership. To say it another way, the primary objective of the *Policy Statement* is diffusion of control—not diffusion of control *to a particular group or groups*. In the case before us, neither West Michigan nor Waters have any other pertinent

[17] *Policy Statement*, 1 FCC 2d at 394.

[18] *Id.*

ownership interests. Thus, consistent with the *Policy Statement* and with the line of cases interpreting it—most notably *WPIX*—both West Michigan and Waters are equal in their ability to further the aim of diversification enunciated in the *Policy Statement*. To go further, as the majority opinion apparently does, and hold effectively that diversification to a minority group or groups is also an intended primary purpose of the comparative process is to do what the Court in *TV 9* expressly said it would not do and what the Commission, following *TV 9*, expressly said in *WPIX* it would not do—and that is, make minority ownership a *separate and distinct* issue in the comparative process, nominally subsumed under the diversification criterion but in reality "a legally separate issue . . . not . . . subsumed under either the distinct diversification or integration issues."[19]

If the majority wishes to *de facto* rewrite *WPIX* and fundamentally revise the stated purpose of the comparative process, it must at least evince an intention to do so and supply reasons suggesting why it is departing from established policy.[20] Not only has the majority failed to specifically acknowledge the policy change it apparently intends to make; its proffered explanation for its rationale is, to put it charitably, somewhat less than persuasive. *TV 9* and *Citizens Communications Center* are duly trotted out; however, the court in *TV 9* expressly found that minority ownership and participation that reflected minority presence in the local community was entitled to enhancement credit under the integration criterion,[21] and *Citizens Communications Center* held only that the 1970 Commission *Policy Statement on Comparative Renewal* precluded challengers from their right to a full comparative hearing under Section 309(e) of the Act and thus could not stand. The majority also cites the *Minority Ownership Report*[22] which even a casual perusal discloses to have done nothing whatever to alter the comparative evaluation process generally or the *Policy Statement* specifically.[23]

---

[19] Dissenting Statement of Chairman Ferris and Commissioners Fogarty and Brown, *supra* at n. 1. While the dissenting Commissioners' position is clearly stated, it was not, at least until today, the position of the Commission.

[20] See, *e.g.*, *Greater Boston v. FCC*., 444 F. 2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971): "Reasoned decision [making] promotes results in the public interest by requiring the agency to focus on the values served by its decision, and hence releasing the clutch of unconscious preference and irrelevant prejudice . . . An agency's views of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." *Id.* at 852.

[21] *TV 9, Inc. v. FCC*, Supplemental Opinion, *supra* at 941, n. 2.

[22] *Minority Ownership of Broadcast Facilities*, 68 FCC 2d 170 (1978).

[23] Judging from paragraph 11, the majority evidently perceives a tension between the Commission's fundamental policy goals of localism and minority ownership which must henceforth be remedied by according minority ownership "full application and significant weight in comparative broadcast

To round out this impressive panoply of authorities, the majority concludes by citing the Conference Report accompanying the adoption of amended Section 309(i) of the Act empowering the Commission to use weighted lotteries in the awarding of broadcast licenses. The majority apparently believes that the Conference Report's discussion of the preferences to be awarded for diversification and minority ownership give credence to today's *de facto* rewrite of the *Policy Statement*. This I frankly find puzzling. In the first place, the conferees were decidedly careful to direct the Commission to consider a number of stated factors in deciding on when to use a lottery notwithstanding its preference for minority ownership.[24] Presumably, had the conferees intended that the minority ownership preference be applied in *all* comparative broadcast licensing situations it would have either (a) *mandated* the use of a weighted lottery in all such situations; or (b) rewritten other Sections of the Act to explicitly require the Commission to award such a preference in the comparative process. The conferees did neither. Thus, while the "plain meaning" of their enactment is for the Commission to award preferences in any broadcast licensing scheme in which the random selection system may be utilized, the majority's inference that this somehow justifies a restructuring of the purpose of the comparative process is not just *not* "plain meaning"—it is absolutely inscrutable.

As its final attempt to inter the concept of weighing the integration enhancement commensurate with minority presence in the local community, the majority states that this approach "would restrict the future expansion of minority broadcast ownership contrary to established Commission policy." This proposition would only appear to be true if, like the majority, one accepts that it is, in fact, "established Commission policy" that the comparative process is specifically intended to increase minority ownership as one of its primary aims. I do not, nor has the Commission, at least before today. However, lest the casual reader fall for the majority's inference that the "nexus" approach would be the functional equivalent of promulgating a *Plessy v. Ferguson*[25] approach to broadcast station licensing, let me hasten to add that there are an infinity of comparative situations in which a minority owner-manager could win under a "nexus"-based approach. For example, the minority's competitor may have other ownership interests, or not be as fully integrated into management as the

---

proceedings." On this point I would simply note that localism and minority ownership would remain perfectly complementary policy goals if we weight the qualitative enhancement awarded for minority ownership commensurate with minority presence in the local community, as the Court in *TV 9* intended we should. Under the majority's approach, however, as this case unmistakably shows, localism, diversification, and minority ownership are transformed from mutually complementary policies into mutually exclusive policies, with minority ownership the apparent winner.

[24] Conference Report, H. Rep. No. 97–765, at 37–38.

[25] 163 U.S. 537 (1896).

minority owner proposes to be, or may not reside as near to or be as closely connected with the community of license as the minority owner is, etc., etc. Because one can already hear the outraged howls of the majority at this point, it may be well to quote again from the supplemental opinion of the Court in *TV 9:*

> With respect to a preference, our opinion does not hold that a competing applicant, without any minority group representation in ownership or management, could not have proved that it could better serve the public interest in promoting diversification of opinion and viewpoint in the respects with which the court is concerned in this case, and by so doing have gained a preference over Comint. In reaching such a conclusion, however, the Commission in our view would have been required to give merit to Comint in the weighing process which led to the preference awarded to the competitor. Under the position taken by the Commission, however, no merit could be accorded Comint in the weighing process.[26]

This, in turn, brings up the most disquieting aspect of the majority's decision today. As the facts in this case plainly show, Waters' minority status is dispositive. In this case West Michigan could not possibly have done more than it did to win. All its owners are long-time residents of Hart. All are or have been involved in community activities in Hart. None have any other media holdings. All will be integrated full-time into the management of the station. None suffers from any character defect. And yet Waters wins, and wins because its owner is a member of a minority group.

I will not discuss the possible constitutional ramifications of this aspect of the case because my dissent is not premised on the majority's action being unconstitutional but rather on its being so at odds with Commission and judicial precedent that one need not reach the constitutional issue to vacate it. Suffice it to say, however, that without some reasonable showing on the record of the qualifications of Ms. Waters and how she proposes to use her racial background to provide the best practicable service to Hart and surrounding Oceana County, the rational connection between the inherently suspect racial classification employed in this case and legitimate governmental interests is based solely on conjecture, and applicants, as exemplified by today's case, cannot be judged in a racially neutral way.[27] Again, because I am not the final arbiter on this issue, and because I need not be to decide this case, I will let wiser heads than mine decide precisely how this case would be decided under the Supreme Court's standard for judging the constitutionality of racial classifications producing purported "reverse discrimination."[28] Suffice it to say that I find

---

[26] *TV 9, supra* at n. 3.

[27] See, "Racial Characteristics of License Applicants Considered in Comparative Broadcast Hearings," 9 Suffolk University Law Review 225, 238–239 (1974).

[28] The leading cases are *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), and *Fullilove v. Klutznick*, 100 S. Ct. 2758 (1980).

Judge Wilkey's statement in *TV 9* to be pertinent to the facts in this case: "There is no way by which a white, yellow, or red man can achieve the same 'merit' point awarded the Black [person] here. This is, as I understand the word, discrimination."[29]

In sum, despite the degree of debate that this case has occasioned, I believe there is considerably less going on here than meets the eye. The majority's decision should be acknowledged for what it is: completely result-oriented. This is without doubt a case in which the majority's "formal obeisance to the rubric of the *Policy Statement* does not obscure the majority's ultimate failure to supply a reasoned analysis which will support its result in terms of applicable law and judicial precedent on the record before it."[30] I do not fault the majority for their good intentions, only for their bad reasoning. But I suppose that sound reasoning is the least important element in any result-oriented analysis.

I dissent.

## Separate Statement of Commissioner Joseph R. Fogarty

In Re: Applications of Waters Broadcasting Corporation and West Michigan Broadcasting Company for a Construction Permit for a New FM Station in Hart, Michigan.

Chairman Mark Fowler's extended dissent and Commissioner Stephen Sharp's more abbreviated version warrant a brief rejoinder.

I believe the "nexus" arguments of the dissenting statement are adequately answered by the Commission's decision. However, it apparently bears emphasizing here that the telecommunications policy value of enhancing minority ownership in the broadcast media is not restricted to a narrow "minority ownership for minority populations" construction and application. The goal of programming diversity, which our ownership policies seek to foster, is of national as well as local scope and importance. The problems, needs, and interests of our communities are national as well as local, and as our decision holds, the minority ownership enhancement factor in comparative broadcast licensing cases is not to be delimited by a "nexus" constriction because "minority controlled stations are likely to serve the important function of providing a different insight to the general public about minority problems and minority views on matters of concern to the entire community and the nation." As the Commission

[29] *TV 9, Inc., supra* at 942.

[30] *Cf.* dissenting statement of Commissioner Joseph R. Fogarty in re *Cowles Broadcasting*, 86 FCC 2d 993, 1036 (1981).

observed in its *Statement on Policy on Minority Ownership of Broadcasting Facilities*, "Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience." 68 FCC 2d 979, 981 (1978). This clarification of the application of minority ownership policy in comparative proceedings is rationally premised and in full accord with our statutory public interest mandate. That Chairman Fowler has a different *policy* view on the relative importance of minority ownership in the Commission's hierarchy of comparative criteria does not make our interpretation and decision here any the less sound or firm as a matter of administrative law.

As for the dissents' suggestion that this decision is tantamount to a case of constitutionally impermissible "reverse discrimination," it is sufficient to observe by way of response that the Commission has carefully weighed and balanced the only factors of relevant comparative difference presented in this particular case—local residence and civic activities and minority ownership—and has determined on balance that Waters' substantial—100%—minority and female ownership integrated with management, together with her residence and civic activities in the proposed service area, outweigh the local residence and civic activities and 24% female ownership credits of West Michigan. The Chairman would perform a different balancing calculus and reach a different result, but again that difference is one of policy and does not detract from the legitimacy of the Commission's exercise of discretion in deciding this case.[31] On the other hand, if his dissent is intimating that the Commission may "constitutionally" "consider" minority ownership among other comparative factors but only so long as that consideration does not affect or decide the outcome, then I submit he is wrong both as a matter of policy and as a matter of constitutional law.[32]

## Separate Statement of Commissioner Henry M. Rivera

### Re: Hart, Michigan FM Comparative Licensing Proceeding

I feel impelled to explore and respond to the nexus argument urged so energetically by both dissenters, and outlined at considerable length by

---

[31] As for the Chairman's assertion that our decision is "result-oriented," it seems that my dissenting colleague finds the result here offensive; clearly, I do not.

[32] *See University of California Regents* v. *Bakke*, 438 U.S. 265, 272, 320 (Powell, J.) and 326 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part) (1978) (Holding that "the State has a substantial [diversity] interest that legitimately may be served by a properly devised [medical school] admissions program involving the competitive consideration of race and ethnic origin.").

Chairman Fowler. A nexus requirement is unpersuasive as a legal matter, untenable as a policy matter, and is wholly at odds with the Commission's prior commitment to expanding minority ownership and participation in broadcasting.

As I understand the Chairman's position, the weight given minority owner-managers in comparative licensing cases under *TV 9*[33] and its progeny must correspond to the presence of minorities in the community of license.[34] This new approach would require a sort of sliding-scale formula to determine the weight due an applicant with minority owner-managers—the larger the minority population in the community, the greater the weight awarded.

Only a highly restrictive reading of *TV 9* and *Garrett* furnishes any support for the dissenters' legal view. It was just such inflexible analysis and decisionmaking by the FCC that those cases firmly rejected. In each case, the applicants argued that their minority status was entitled to special consideration in the licensing process, but the Commission brushed them aside and stubbornly clung to established administrative practice. In each case, the court criticized the Commission for its "heavy reliance upon maintenance of the status quo," 495 F.2d at 937, and emphasized that the public interest mandate is broad enough to acknowledge and seek to remedy the "infinitesmal" number of minority-owned and -operated stations nationwide. *Id.* at 936–38; 513 F.2d at 1031–33. The gloss placed on *TV 9* by the Chairman—that the presence of local minorities was "critical" to the result—is simply wrong. The court rather held that the Commission must award merit for minority ownership and participation where it is "likely to increase diversity of content, especially of opinion and viewpoint. . . ." 495 F.2d at 938. *TV 9* and *Garrett* do note the presence of minorities in the cities in question, but do not even remotely suggest that the Commission is limited to awarding 'merit' in these circumstances. The decisions imply a permissive, not restrictive, application.

Since *TV 9* and *Garrett* were decided, the Commission has developed a more positive interest in broadening minority participation in the media,

---

[33] *TV 9, Inc.* v. *FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 418 U.S. 986 (1974). *See Garrett* v. *FCC*, 513 F.2d 1056 (D.C. Cir. 1975).

[34] I must confess to some uncertainty over the Chairman's precise position. On the one hand, he seems to argue only that the majority's substantial enhancement for Waters' minority and female ownership was in error here because there are few blacks in Hart. On the other hand, he apparently believes that even if there were a more significant number of blacks in the community, race could not be "dispositive" because it is an unalterable trait. (In this regard, he approvingly quotes Judge Wilkey's dissenting statement to denial of rehearing *en banc* in *TV 9* that awarding merit based on race is impermissibly discriminatory because "there is no way by which a white, yellow, or red man can achieve the same 'merit' point awarded the Black . . . here.") Under this latter view, the minority 'merit' would be duly recorded only to be ignored in the ultimate comparative analysis. The implications of the Chairman's nexus-based approach are thus more far reaching than may be evident.

consistent with the spirit and tenor of those cases.[35] The narrow construction of these and other authorities advanced by the Chairman would reverse that consistent policy trend, and would, at least in my view, effectively signal a return to the days of pre-*TV 9* policymaking.[36]

There is also little, if any, legal or analytical consistency in supporting waiver of FCC rules, approval of distress sales and tax certificates, and award of licenses by weighted lottery to further minority ownership without reference to the racial and ethnic makeup of the community in question on the one hand, while on the other hand opposing special consideration of minority status in ordinary comparative cases without a nexus showing. All these measures find support in the cases the Chairman would so narrowly construe.[37]

The dissenters' view also makes for unwise and unworkable policy. It is unwise because, as our opinion observes, it would unduly restrict future expansion of minority ownership contrary to established Commission policy. The impact of such a restriction in comparative cases cannot be underestimated because channel assignments in the larger cities where minorities are most densely concentrated are substantially depleted. Remaining channel vacancies are plentiful in places like Hart, Michigan, where under the Chairman's theory, outcome-affecting merit could not be awarded. Thus, the dissenters' position in practical effect would largely

---

[35]Since at least 1978, the Commission has held the view that adequate representation of minority viewpoints in broadcasting "serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience" and thus enhances the "key objective" of diversity rooted in the Communications Act and the First Amendment. *See Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979, 981 (1978).

[36] Part of the Chairman's discussion of the latent constitutional infirmity he finds lurking here is reminiscent of the Commission argument rejected in *TV 9*. The Chairman complains that there has been no "showing on the record of the qualifications of Ms. Waters and how she proposed to use her racial background to provide the best practical service to Hart and surrounding Oceana County. . . ." The FCC unsuccessfully advanced a startlingly similar argument to justify its refusal to award credit for the participation of black owners in *TV 9*—because "there is nothing in the degree or type of participation proposed by [the black stockholders] which gives assurance that the benefits of their racial background would inure in any material degree to the operation of the station." 495 F.2d at 936.

[37] The Chairman's repeated inscrutible charges that our action here is of "dubious constitutionality" may lead the casual reader to believe that he views any outcome-affecting consideration of race to be constitutionally impermissible (especially, as noted earlier, when coupled as it is with citation to Judge Wilkey's dissent). In any event, such positive consideration is consistent with applicable Supreme Court precedent, specifically the controlling plurality opinion in *Regents of University of California* v. *Bakke*, 438 U.S. 265 (1978). The diversity interest *Bakke* approved in the context of medical school admissions is functionally indistinguishable from the First Amendment interest in an uninhibited marketplace of ideas held paramount in broadcasting. *See Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969). The latter interest is furthered by diversity of ownership of broacast facilities. Importantly, for *Bakke* purposes, race of ethnicity is only one of numerious factors relevant to the decisionmaking process to choose between competing applications. In this case, contrary to the Chairman's contention, race was no bar to West Michigan. It could indeed have done more to show that it was comparatively superior to Waters—by proposing more efficient frequency use, or some form of specialized programming, to name just two possibilities. *See Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 397–98 (1965).

eviscerate the thrust of *TV 9* and block the continued progress toward increased minority ownership which the Commission has identified as being of pressing public interest importance.

The sliding-scale approach to minority ownership and participation is also administratively unworkable. If the degree of enhancement would be magnified or diminished depending on the percentage of minority residents in the community of license, how would that weight be computed? For example, would an applicant with a ten-percent black owner-manager in a 100-percent black community be entitled to more or less merit than a 100-percent black-owned and -operated applicant for a community with a ten percent black population? Would the answers change if the above-described situations were the same except that the resident minorities were hispanic? These questions of application would proliferate under a nexus approach.

In sum, the law and policy urged by the dissenters would convert our broadcast licensing system from one intended to foster a multiplicity of voices to one which encourages minority broadcast ownership opportunities only in minority communities. Such isolation of voices is reminiscent of the long discredited notion of "separate but equal." We have come too far as a Nation to revert to this view.

## Dissenting Statement of Commissioner Stephen A. Sharp

Re: Hart, Michigan Comparative FM Proceeding

The Commission has before it two competing applications for a construction permit for a new FM radio station in Hart, Michigan. The majority of the Commission reverses the Review Board which, in turn, reversed the Administrative Law Judge. Having read all the opinions in this case, I have concluded that this is, for the most part, an ordinary comparative hearing case.

What distinguishes this case from others is the injection of a politically sensitive policy issue into the decision: "Is the integration preference for minority ownership based upon some nexus to the existence or numbers of minority group members in the community's population?" While it might be politically expedient for a Commissioner who is committed to increasing minority ownership to follow the majority opinion or not to participate, I must dissent.

I dissent because I am a firm believer that, even where a policy might be correct, there is a right way and a wrong way to effect it. A good end does not justify improper means. Similarly, a consistent and intellectually honest basis for a policy is essential.

Here the Commission has changed its policy. To be sure the majority may believe that they have held this view all along. The fact is, however,

that such a view never has been articulated by the Commission. Chairman Fowler's dissent ably catalogues the applicable precedent and analyzes its impact.

When the Commission changes course, it has a legal duty to provide "an opinion or analysis indicating that the standard is being changed and not ignored and assuring that it is faithful and not indifferent to the rule of law." *Columbia Broadcasting System, Inc. v. FCC*, 454 F.2d 1018, 1026 (D.C. Cir. 1971). This duty is especially pertinent where, as here, the Commission acts without public comment on the proposed change in policy. The Commission has abandoned a logical, defensible rationale for discriminating in favor of minority groups—the nexus between minority ownership and service to the minority community—and has, instead, diluted the justification to the point that the Commission appears to have made minority group membership decisive in and of itself. Such discrimination without adequate justification undermines the basis for the preference. The majority's short-term gain may be the Commission's and the public's long-term loss.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1983– 381-692: 2007